## Table of Contents

## Overview of the Civil Litigation Process

| COMMENCEMENT OF PROCEEDINGS | DISCOVERY | PRE-TRIAL | TRIAL | POST TRIAL |
|---|---|---|---|---|
| **Notice of Civil Claim** (R. 3-1)<br>**Petition** (R. 16-1)<br>**Service of Pleadings** (R.4-1 to 4-2)<br>**Response to Civil Claim** (R. 3-3)<br>**Counterclaim** (R. 3-4)<br>**Third Party Notice** (R. 3-5)<br>**Reply** (R. 3-6) | **Document Disclosure** (R. 7-1)<br>**Examinations for Discovery** (R. 7-2)<br>**Interrogatories** (R. 7-3)<br>**Notice to Admit** (R. 7-7)<br>**Particulars** (R. 3-7(18-24)) | **Interlocutory Applications** (R. 8-1 to 8-5 and 22-1)<br>**Garnishing Orders** (*Court Order Enforcement Act)*<br>**Injunctions** (R. 10-4)<br>• *Mareva* Injunctions<br>• Anton Pillar Orders<br>**Case Planning Conference** (R. 5-1)<br>**Mediation and Offer to Settle** *(Notice to Mediate (General) Regulation)*<br>**Summary Disposition** (R. 9-6 and R. 9-5) | **Summary Trials** (R. 9-7)<br>**Trial Rules** (R. 12-1 to 12-6) | **Orders** (R. 13-1)<br>**Costs** (R. 14-1)<br>**Appeals** |

The process of civil litigation may not be as linear as the chart suggests; eg: can have an injunction at the outset of proceedings. It is important to think about the rules in terms of *process*→ **On exam will be faced with a client with a problem and a goal of where they want to get too, need to understand overall process to get them to their litigation goals.** When you *do* and *don't* use the rules is important to understand; think about where they fit into the overall processes.
The Rules are the "**servants and not the masters**" of the Court; Court has inherent jurisdiction to regulate and to supervise the litigation process

## Principles and Professional Obligations

Rule 1-3

**RULE 1-3: The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.**

These goals underpin all of the rules; all rules are **informed** and **interpreted** in accordance with these goals

**Decision on the Merits:** Rules are meant to set up a process that sets up a just result based on what the substance of the position of the parties re; shouldn't be allowed to circumvent a decision on the substance

**Proportionality:** the object of Rule 1 (3) should be pursued in a manner proportionate to: i) the **AMOUNT** at issue; ii) **IMPORTANCE** of the issue; iii) **COMPLEXITY** of the proceeding

- The way in which you take the rules into account is meant to be tailored to those considerations; For example, the smaller the matter, the less process is required
- However, BG suggests that **these factors are vague** and involves some **subjectivity** (ex: whose amount at issue are you taking into account? What importance should the court consider in determining proportionality? Complexity of the proceeding is circular→ proportionality is meant to see how complex it will be)

**GENERAL DUTIES AS COUNSEL**

| | |
|---|---|
| *Weldon v Agrium* | Investigating the substantive merits of a case in a renewal hearing does not advance the objects of the rule, because it is likely that there will be a wrong assessment at that stage |
| *TJA v RKM* | The reason for allowing liberal amendments is to ensure the real issues are determined in the litigation (i.e. there is a decision on the merits |
| *Dufault v Stevens and Stevens* | Documents in possession of third parties that meet document production standards should be disclosed to assist in deciding matters on their merits |

**Rule 22-7(1): Unless the court otherwise orders, a failure to comply with these rules shall be treated as an irregularity and does not nullify a proceeding, a step taken or any document or order made in the proceeding.**

This rule reflects the principle that Court's are reticent to imperil a party's ability to get their substantive rights; ex: when someone hasn't abided by the rules, there is an inclination not to deprive people of their day in court, and indeed, linking back to 1-3, encouraging decisions on the merits. Thus, won't give judgment and knock out their defence based on a failure to abide by the rules

- Another course theme: **How should the rules be enforced**? Does it matter that they are not mandatory?
- *Might better achieve balancing in McEachern speech*

### Speech of the Chief Justice

**The litigation process must balance: the effectiveness of the search for truth and a just result against the practical realities of cost and timeliness**

"*… some of our rules … seem designed to obtain perfect justice… we have never tried to assess on a cost-benefit ratio, whether perfect justice which is only available to a limited group of the litigating public is worth its cost*."
"*…we cannot carry on …delivering a kind of Mercedes or Lexus judicial product where every issue is going to be litigated to the last warehouse full of documents, the evidence of countless experts, the longest imaginable cross-examinations and unlimited new causes of action*."

The issue of cost and access to justice is at tension with perfect justice and the search for truth, **that problem and consideration that proportionality is meant to address**. There is no hierarchy as to whether the goals should be to obtain a just result, an inexpensive result or a speedy result. Getting a just result requires more process, discovery, disclosure→ more information gets us closer to the truth, but increases the cost, delays things---INHERENT BALANCING
**THINK CRITICALLY**: As we go through the process and the rules→ is there a better answer? What should the answer be?

## Ethical Obligations

Ethical obligations come from the following sources:

1. Barristers and Solicitors Oath
2. Code of Professional Conduct
3. Common Law
4. Good Conscience
5. Best Practices

Best Practices approach to Ethics: consult other lawyers for help, law society has ethics advisors who can help

| | |
|---|---|
| diligently, faithfully and to the best of your ability execute the offices of Barrister and Solicitor | Barristers & Solicitors Oath |
| that you will **not promote suits on frivolous pretences**; | Barristers & Solicitors Oath |
| **not to pervert the law** to **favour** or **prejudice** anyone | Barristers and Solicitors Oath |
| to act in all things **truly** and **with integrity** | Barristers and Solicitors Oath |
| that you will uphold the rule of law and the rights and freedoms of all persons according to the laws of CAN and BC | Barristers and Solicitors Oath |
| lawyers also have general duties to act with integrity and uphold the standards of the legal profession. | Code of Professional Conduct |
| Must not give an undertaking that cannot be fulfilled; Must fulfill every undertaking given; and Must honour every trust condition accepted. Commentary [1] requires clarity in dealing with undertakings | Chapter 7.2-11; 5.1-6 |
| **DUTY OWED TO THE STATE** | |
| Not aiding or counseling anyone to act contrary to the law. | Code of Professional Conduct |
| **DUTY OWED TO THE COURT** | |
| Acting with candour and fairness; ii) Being courteous and respectful to the court iii) Not misstating facts or law. | Code of Professional Conduct |
| Abuse of process by instituting proceedings, which, although legal in themselves, are clearly motivated by malice on the part of the client and brought solely for the purpose of injuring another party [*hard to know when triggered* | Code of Professional Conduct, 5.1-2 |
| Offering false evidence, misstating facts or law, suppressing something that ought to be disclosed | Code, 5.1-2 |
| Knowingly asserting something for which there is no reasonable basis in evidence or cannot be taken on judicial notice | Code , 5.1-2 |
| Must not refraining from informing the court of any pertinent authority directly on point and which has not been mentioned by an opponent | Code, 5.1-2 |
| Solicitors have a duty as an officer of the court to investigate and as far as possible ensure that document disclosure is properly provided. Qualified by reasonableness with practical circumstances | ***Myers v Elmen*** |
| A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal; the matter is purely formal or uncontroverted; or it is necessary in the interests of justice for the lawyer to give evidence. | S. 4.02 (1): |
| A lawyer who is a witness in a proceeding must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted. [This section reflects the idea that you can't be a witness and advocate] | S. 4.02(2) |
| **DUTY OWED TO THE CLIENT** | |
| Knowing enough about a case to provide an open and undisguised opinion of the merits of the case. | Code of Professional Conduct |
| Advising to avoid or end litigation where there is a fair settlement available | Code of Professional Conduct |
| Treat adverse witnesses, litigants and counsel with courtesy | Code of Professional Conduct |
| Do whatever you can, fairly and honourably, to provide the client with every remedy or defence available within the law. | Code of Professional Conduct |
| Not to provide your own affidavit before a court when you are an advocate except as to uncontroverted matters, or if it is necessary in the interests of justice. | Code of Professional Conduct |
| requires lawyers to represent **clients** resolutely and honourably. | Code [Chapter 5.1-1] |
| Commentary 6 places heightened duties on lawyers in *ex parte* applications. Court may still expect based on the common law that you have an obligation to say what the other side would say if they were there | Code of Professional Conduct, Commentary 6 |
| Assisting a client to do anything or permitting the client to doing anything which is dishonest or dishonourable. | Chapter 5.1-2 |
| **DUTY OWED TO OTHER COUNSEL** | |
| Treat other lawyers with courtesy and good faith | |
| Never give or request an undertaking that cannot be fulfilled. | |
| Avoid sharp practice and take no paltry advantage. | 7.2-2 |
| Lawyers cannot record conversations with clients or other lawyers without informing them first. | 7.2.3 |
| lawyers to be courteous with all those with whom they have dealings. | Chapter 5.1-5 |
| A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice. | Ch 7-2.1 |
| **Default proceedings**: A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice. | Chapter 7, Commentary [5] |
| Accede to reasonable requests that do not prejudice your client's rights | |
| obliged to answer communications that require an answer with "reasonable promptness | 7.2-5 |
| if a person is represented by a lawyer, another lawyer must not:<br>Communicate or deal with the person; or Attempt to negotiate with the person directly; unless you have consent from the person's lawyer to do so. | 7.2-6 |
| imposes a similar rule where the "person" is a corporation. In those circumstances a lawyer cannot contact an officer or employee without consent of the company's lawyer if that person [*note this isn't just anyone associated with the company*] Can bind the company; Directs or regularly consults with the company's lawyer; or Is directly interested in the representation. | 7.2.8 |
| **DUTY TO WITNESS** | |
| Dissuading a witness from giving evidence, or advising a witness to be absent | |

| | |
|---|---|
| You can seek information from any witness – even if they are a witness for the other side – provided you disclose your interest in the matter(subject to rules in Ch 7.2-4 to 7.2-8 (communications rules) | Chapter 5.3 |
| During your examination of your own witness, you can discuss anything with the witness.<br>During cross-examination you cannot discuss evidence in chief or any matter touched on in chief.<br>After cross-examination you can discuss any matter with leave of the court.<br>If the discovery is for one day, you must refrain from discussing evidence with the witness.<br>If longer than one day you can discuss any matter at the end of the day if you tell the other side first. | 5.4 |
| **DUTY TO LAY LITIGANT** | |
| You must urge them to obtain independent legal representation; You must ensure the unrepresented person does not think you are looking out for their interests; and<br>You must make it clear that you are representing only your client's interest. | 7.2-11 |

## Commencing Proceedings

There are two ways to commence proceedings in the BC Supreme Court:

| Notice of Civil Claim | Petition |
|---|---|
| When to use: **Civil claim is the** default **method of commencing proceedings**<br>**Rule 2-1:** Except where otherwise authorized by an enactment or these rules, every proceeding in the court shall be commenced by filing a notice of civil claim. | **When to use:** A petition can only be used in specific circumstances contemplated, or authorized by **statute** [ex: *Judicial Review Proceedings Act*] or the ***Rules*** |

**Each is a document that sets out the facts and legal basis for the relief sought from the court.**

**R. 9-5** provides for striking out (or requiring to be amended) "bad" pleadings

The most commonly applied subsection is **R. 9-5(1)(a)** where the pleadings disclose no reasonable claim or defence. The test under (a) is a very high one [*is circumventing a hearing on the merits*], and the application assumes that the facts as pleaded are true.

**TEST: Is it "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out?**

The court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

**a)** discloses no reasonable claim or defence:
**(b)** unnecessary, scandalous, frivolous or vexatious pleadings.
**c)** pleadings that may prejudice, embarrass or delay the fair trial or hearing or the proceeding.
**d)** pleadings that are an abuse of process. [for example, repetitious, *res judicata*]
**R. 9-5(2)** provides that no evidence is admissible on a R.**9-5(1)(a)** application.

***Rose v RCMP:*** the pleading were so garbled they managed to engage all these elements; 'plain and obvious that he had no chance of success]; ***National Leasing:*** see a "glimmer of a defence"; invites defendant to amend statement of claim in a comprehensible manner

**Notice of Civil Claim**

**Purpose** of NOCC: define issues of fact to be determined by the Court; identify material facts for each cause of action; set out P's right of title, defendant's wrongful conduct + resulting damages [***Sahyoun v Ho***]

Essentially, a proper notice of civil claim allows the defendant to know the claim to be met: claim must be, per **Rule 3-1 (2):**

**Concise and lucid, plead material facts; relief sought must be pleaded and must be clear; legal basis for the claim must include identification by** name of the cause of action or statute relied on by the plaintiff; the defendant must know the cause of action against them! [***Sahyoun v Ho***]

See full text of Rule 3-1 (2) below

**RENEWAL:**

**Petition Requirements & relevant rules**

Rule 2-1(2) sets out the circumstances where an application can be brought by petition (or requisition in certain circumstances). Ex: only question is will, deed, or foreclosure proceedings

Rule 16-1(2) requires the petition and all affidavits in support be filed, i.e everything supporting your proceeding takes place at the beginning [petitions aren't as fact heavy, generally Q of law].

Both the **petition** and **affidavits** must then be served by **personal service**. [Rule 16-1(3)]

**Why** do we have proceedings by petition?

- Petition matters follow a different process that generally does not lead to a trial.
- The process can be **faster** than an action brought by writ.
- Most pre-trial processes are available in an "**action**". R. 1-1 defines "action" as proceedings commenced by notice of civil claim, not by petition.
- Hearing of a petition generally proceeds based on affidavit evidence [*generally no witnesses*].
- The court retains discretion to have a petition matter transformed into an action. [Rule 22-1(7)]

# Notice of Civil Claim

## Rule 2-1

**Choosing the correct form of proceeding**—Provides that the default mode of claim is notice of civil proceedings, 2-1(2) sets out when a proceeding should be initiated via a proceeding

## Rule 3-1

Notice of civil claim (1) To start a proceeding under this Part, a person must file a notice of civil claim in **Form 1.**
Contents of notice of civil claim
(2) A notice of civil claim must do the following: (a) set out a concise statement of the material facts giving rise to the claim; (b) set out the relief sought by the plaintiff against each named defendant; (c) set out a concise summary of the legal basis for the relief sought; (d) set out the proposed place of trial; (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued; (f) provide the data collection information required in the appendix to the form; (g) otherwise comply with Rule 3-7.

### *Sahyoun v. Ho, 2013 BCSC 1143*

**The decision sets out in detail the purpose and principles applicable to notices of civil claims.**
*Application in a medical negligence case, to compel the plaintiffs to file an amended notice of civil claim that accords with the rules.*
Purpose of the notice of civil claim is: i) to define the issues of fact and law to be determined by the court; Identify the material facts for each cause of action relied upon by the pleading party; Set out the plaintiff's right or title, the defendant's wrongful conduct and the resulting damages.
Overall test: A proper notice of civil claim enables a defendant to know the claim to be met.

- A claim must be **both concise and lucid**. [flip side of 9-1,b,c]
- **Material facts** must be pleaded, and are the facts that are essential to establishing the cause of action.
- Particulars are not necessarily material facts, but rather are detail necessary for the defendant to understand the case to be met.
- **Relief sought must be pleaded and must be clear**.
- Legal basis for the claim now must now include identification by **name of the cause of action or statute relied on by the plaintiff→** and tied to conduct of the defendant
- Here, the plaintiff listed numerous statutes and authorities, but did not link them to the facts or defendants in a way that identified the cause of action. The defendants could not know the case against them without speculating and guessing.
- In the result, the plaintiffs were ordered to prepare an amended notice of civil claim that accorded with the Rules and the principles in the judgment.

### *National Leasing Group Inc. v. Top West Ventures Ltd., 2011 BCSC 111*

**Courts are willing to give self reps a chance, and willing to give leave to amend if there is a "glimmer"**
*The defendant filed a Statement of Defence and Counterclaim that was mostly a garbled mess. The plaintiff applies to strike out the pleadings*

- The court dissects the language of the pleadings and concludes that there may be a "glimmer of a defence."
    - Test: reasonable chance of being turned into a reasonable proceeding
- However, the court concludes there is no possible counterclaim on the pleadings as filed.
- In the result, the court strikes out the counterclaim and invites the defendant to amend the Statement of Claim in a comprehensible manner.
- NOTE: there is a hope of a claim, esp w a lay litigant, it won't sway the court from ensuring there is a potential decision on the merits.

### *Jerry Rose Jr v. The University of British Columbia, 2008 BCSC 1661*

**There was no conduct by any defendant set out, while there may be a potential cause of action, frivolous/vex**
Plaintiff claimed numerous defendants had been involved in conducting Invasive Brain Computer Interface Technology.

- The court accepts the Statement of Claim discloses a potential cause of action in assault and battery, as well as trespass to property. The court, though, agrees to strike out the claims, as the allegations do not set out who did what, when, where or how.
- The court also concludes the Statement of Claim is frivolous and vexatious and embarrassing and prolix.
- The court notes the relief claimed both "in amount and in vehicles" bears no relationship to the allegations of act.
- Defnece counsel argued: none of the conduct by any particular defendant was set out (who did what to whom when, Court does accept that there is a potential cause of action; Able to rely on all aspects of rule 9-5

## Petitions

### Rule 16-1

Sets out in more fulsome detail the requirements for a petition proceeding and the associated procedures

## Limitation Periods

Most matters brought to the court must be filed within a prescribed period or the right to bring the claim is lost.

- In the absence of a specific statute that establishes a limitation period, the ***Limitation Act*** generally applies which provides a **2 year "basic limitation period" [section 6]**. Do note that some statutes establish specific limitation periods.
- No claim (other than exempted claims) can be commenced more than 2 years after the day on which the claim is "discovered".
- A claim is deemed to have been "discovered" when a person knows, or reasonably ought to have known **all** of: That they have **suffered** injury, damage or loss; [*no enumerated threshold for how much*]; It was **caused** or **contributed** to by someone's act or omission; That the act or omission was that of the defendant; and an action would be an **appropriate** means to seek **redress [section 8]**.
- The statute effectively creates a deferral of the running of the limitation period until the basic information relating to a claim has been discovered or was objectively discoverable.
    - ✔Advantages: Allows for a single, shorter limitation period that is responsive to the particular circumstances of the claim. [*mitigated by discovery principles → need all info]*
    - ✖ Disadvantages: Discoverability can make the basic limitation period less certain and more subject to argument and dispute.[*subjective/objective test; and dispute over redress issues are both common*]
- **Policy consideration**: trying to make it a fair period, but not completely indeterminable
- **Ultimate limitation period** is 15 years and runs from the date of the act or omission **regardless** of **when** damage is suffered and regardless of **discoverability [section 21]**.
    - ✔Advantages: Provides certainty and finality.
    - ✖ Disadvantages: Can deprive litigants of a claim they never even knew they had.
- There are a number of exceptions to which the limitation periods do not apply, including to claims involving sexual misconduct. [s. 3(i)] [this factor **reflects policy reasons**]
    - There are also special discoverability rules including for minors and people under legally disability
    - Related claims such as counterclaims and third party claims can be brought even if they would otherwise be out of time. [ex: *someone brings a claim against you have an available claim to sue someone else you on't lose that*] [**section 22]**
    - An acknowledgement of liability either in writing or by conduct (such as payment) extends both the basic and ultimate limitation periods. [s**. 24**]

***Limitation Act*, S.B.C. 2012, c. 13, s. 1, 3, 6, 8, 21, 22 and 24.**

## Renewal

**Rule 3-2(1)** provides an original notice of civil claim is in force for only 12 months. If it is not served within this period, it expires. The Rule provides that on application made before or after the 12 months, the court may order the original notice be renewed for up to 12 months.
Contrast with **Rule 3-2(2):** If a renewed notice has not been served, on an application *within* the renewal period, the court may order the renewal of the writ for a further period of not more than 12 months
**Rule 3-2(4)** expressly provides that a renewed notice **prevents the operation of any statutory limitation period**—i.e the limitation period doesn't really have a role to play as long as you have valid notice
Potentially infinite number of referrals; but must make sure that the renewed notice doesn't expire before the application for further renewal

Whether renewal will be granted is based on the factors based in ***Swetlishnoff***

- Was the application to renew brought **promptly**;
- Did the defendant have **notice of the claim** despite not having been served;
- Has the defendant suffered **prejudice [**"imperilled ability to mount an adequate defence];
- Was the failure to serve attributable to the **actions of the defendant**?
- Was the failure to serve the writ attributable to the fault of the plaintiff or to the fault of his solicitor?

The overarching objective is to see that justice is done; and Prejudice means more than just delay, but rather must be something that interferes with the defendant's ability to mount a defence. [***Swetlishnoff***]

In such an analysis, the Court shouldn't delve too far into the merits, only if it is "bound to fail", ex: clearly out of time [***Weldon v Agrium***]

### *Swetlishnoff v. Swetlishnoff, 2011 BCSC 1257*

*The plaintiff did not serve the actions within 12 months, and the defendants sought to have the actions dismissed. The plaintiff had brought the actions essentially to attempt to block the sale of the properties at issue. He deposed in an affidavit that the action did not appear necessary any longer once the defendants decided not to sell the properties, so he had not served them.*
The court adopts the test for renewal of a claim in Rule 3-2 based on the prior test for renewal of a writ. The test considers above factors.

- The court also distinguishes between the plaintiff's deliberate decision not to serve, and an inadvertent failure to serve by counsel contrary to the plaintiff's wishes.
- In the circumstances of this case: The application was not brought promptly since one claim had expired five years ago and one three years ago; The defendants did not have notice of the claim; The defendant has suffered real prejudice by her declining health over the period of the delay; The failure to serve was not attributable to the defendant's conduct; The plaintiff deliberately decided not to serve the claim; Fault for the delay was the plaintiff's not the solicitor's.
- *In the result, there was no reason to renew the claims and the actions were dismissed. CPL was removed from the property*

### *Weldon v. Agrium Inc., 2012 BCCA 53*

*The defendants applied to have the renewal set aside on the basis that the claim was barred by the Limitation Act and that the delay in serving them had prejudiced the defendants. The defendants claimed that one potential witness involved in the matter was dead and another was retired. The defendants also claimed they were having difficulty locating pertinent documents.*
The issue in this case was the degree to which the court will consider the merits of a claim on an application to renew. **Held:** "not in most cases"

- The Court held that there is scope to consider the merits where it is obvious the claim is bound to fail. ["certainly if the action on its face is clearly out of time and the court can be satisfied that the plaintiff will not be prejudiced by determining the issue at this stage, it may be both possible and appropriate to reach the obvious conclusion"
- However, where evidence is required to conclude that the claim is without merit, **generally**, the time for receiving such evidence is not on a renewal application.
- The Court adds that the real lesson of *Seelinger* is that the "broader interests of justice" must be the courts focus in an application under R 3-2(1) and that delving intot he merits is not likely to be fair, nor to advance the efficient determination of the action
- In most cases, the application for a renewal is not the appropriate time to consider if an action is bound to fail.

## Service and Delivery of Documents

*The object of all service is . . . only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him: and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.*
—Lord Cranworth, LC, cited in ***Orazio v Ciulla***

**Overview of rules pertaining to service and delivery of documents**

| | |
|---|---|
| **Rule 4-1** | Sets out the address for service requirements<br>Party must have address for service, additional addresses for service, change of address for service |
| **Rule 4-2** | Governs ordinary service, documents normally to be services by ordinary service, how to serve documents by ordinary service, when service by delivery is deemed to be completed, when service by mail is deemed to be completed, when documents may be served by fax, when service by fax or email is deemed to be completed; if no address for service |
| **Rule 4-3** | When documents must be serviced by personal service; how to serve documents by personal service |
| **Rule 4-4** | Alternative methods of service |
| **Rule 4-5** | Service outside British Columbia |
| **Rule 4-6** | Proof of service |

Service rules are intended to ensure that parties to litigation get **proper notice of proceedings** that may affect their interests.

**PERSONAL SERVICE:** **Rule 4-3(1)** requires a notice of civil claim or petition to be **served personally**, unless there is an order otherwise.

**Per *Orazio:* TEST:** The essential ingredient is that the process delivered to the defendant must be so delivered under circumstances which enable the Court to conclude **that he knew, or reasonably should have known, what the document was.**

| ✔GOOD PERSONAL SERVICE | ✖ BAD PERSONAL SERVICE |
|---|---|
| Scenario in ***Orazio***: defendant handed back writ, but knew what it was, so test was met<br>Putting the document into a coat of someone who didn't want to accept the writ<br>Okay if you are drunk [***Wang v Wang***] | Throwing a copy of the writ on the ground calling after a defendant running away and saying "here is the writ for you"; Handing the defendant a writ in an envelope where there was no indication of its contents and the D was not aware that an action had been started<br>Shoving under windshield wiper while someone is in the car in traffic [***Wang v Wang***] |

**Rule 4-3(2)** provides for how personal service is accomplished: for an individual you leave a copy of the document with him or her, for a company:

1. you can leave a copy with the president or other listed officials of the company
2. serve in the manner provided by the *Business Corporations Act* or any enactment relating to service.
3. *Business Corporations Act* s. 9 provides that service can be effected by mailing it by registered mail, to the company's registered office

After formal initial personal service, service can be effected by "**ordinary service**" by delivering to an "address for service" by: Leaving it at the address for service; Mailing it to the address for service; Faxing it to a fax number provided as part of the address for service; or Emailing it to an email address provided as part of the address for service. [**R. 4-2(1) and (2**)]

**Rule 4-1** requires every party of record is required to provide an address for service and to keep it up to date.

- The address must be either:
- the address of a lawyer;
- an accessible address within 30 km of the Registry; or
- an accessible address and a postal address in British Columbia, a fax number or email address.

### *Orazio v. Ciulla, (BCSC 1966)*

**Sets out the test for personal service: must know, or reasonably should have known what doc was**

*Factually odd case: The usual lawyer for the defendant shared office space with the counsel for the plaintiff. A writ was issued by the plaintiff. The defendant's usual counsel took over negotiations with the current counsel for the defendant trying to reach a settlement. The defendant came to see the usual lawyer about another matter. The usual lawyer advised the defendant about the writ, explained what it was, and handed a copy to the defendant. The defendant handed it back, and did not report the matter to his current lawyer. The defendant argued he was never effectively served because the rule requires one to* ***both*** *deliver* <u>*and*</u> *leave with the defendant the writ.*

The court held the test for personal service was:

- The essential ingredient is that the process delivered to the defendant must be so delivered under circumstances which enable the Court to conclude **<u>that he knew, or reasonably should have known, what the document was.</u>**
- That the defendant knew the document was a writ, issued against him by the plaintiff and knew in addition the general nature of the claim therein advanced.

Case discussed a number of examples of valid and invalid forms of personal service:

- BAD: Throwing a copy of the writ on the ground calling after a defendant running away and saying "here is the writ for you"; Handing the defendant a writ in an envelope where there was no indication of its contents and the D was not aware that an action had been started
- GOOD: Putting the document into a coat of someone who didn't want to accept the writ; Giving the document to the defendant and explaining what it is, but accepting it when the defendant hands it back after he has read it (<u>case in question</u>)

- Here, that test was satisfied.

### *Wang v. Wang, 2012 BCSC 1077*

**Personal service is okay if you are drunk, not if you are driving someone sticks docs under your windshield**

*The plaintiffs were the parents of one of the defendants. The plaintiffs wished to sell a property in which the defendants lived. The defendants refused to leave. Instead, one of the defendants used a power of attorney granted by the plaintiffs to sell the property to another of the defendants. Default judgment was taken by the plaintiffs after the defendants had been purportedly served. Two of the defendants sought to set the default judgment aside, contending they had not been personally served with the notice of civil claim. A process server had given the notice of civil claim to one defendant in a restaurant and had pictures of him looking at it. That defendant claimed he was too drunk to remember having received the notice of civil claim. Another process server had accosted the defendant while she was stopped in her car at a traffic light. He advised that he had papers for her and stuck the papers under the car's windshield wipers as she drove away*

- The issue was whether these defendants had been served.
- The court cited *Orazio* and held that no reasonable person would conclude that a stranger approaching a car in traffic and shoving papers under the windshield wipers would provide the person with an opportunity to realize they were being served with legal documents.
- On the other hand, the evidence showed the other defendant had received and reviewed the papers provided to him.
- The claim that he was drunk, did not alter the fact that he received the papers and had the opportunity, objectively, to realize what they were.
- Nevertheless the default judgment was set aside for both defendants, with differing cost consequences in light of the court's respective conclusions on the service issues.

## Service (substitutional and *ex juris*)

*The mere fact that it may be a matter of some difficulty to reach him (unless, for example, he is evading service) does not of itself relieve the plaintiff of the obligation of serving [the defendant] personally.*
—McTaggart, Co Ct J, cited in ***Luu v Wang***

**ALTERNATIVE SERVICE:** Sometimes the strict requirements for service cannot be complied with easily. Substitutional and alternative service are referred to interchangeably.

**Rule 4-4(1)** allows an order for alternate service where

1. it is impracticable to serve by personal service;
    a. **Impracticable** generally means that serving the defendant personally will be so onerous or expensive as to be more trouble or expense than is reasonably justifiable in the circumstances. [***Luu v Wang***]:
    b. **In that case:** The claim was substantial (over a million dollars); There was no evidence of the cost of serving the defendant in China; There was no evidence that it was difficult to personally serve the defendant in China; There was no evidence that reasonable steps had been taken to attempt to serve the defendant.
    c. In the absence of such evidence, the plaintiff failed the "**impracticable**" branch of the test.
2. or the person cannot be found after a diligent search;
3. or is evading service.
    a. In ***Luu v Wang*** not able to say they couldn't be found or that they were evading service

The alternative service order must be served with the document to be served with some exceptions. [**R.4-4(2)]**
The form of alternative service is within the discretion of the court. Some common alternative service provisions include:

- Posting at the courthouse.
- Posting on the door of a residence.
- Publishing notice in the newspaper.
- Serving on someone else in contact with the person.

**SERVICE *EX JURIS*:** Giving notice to someone outside of British Columbia
These criteria are intended to ensure that a matter to be tried in BC, where a defendant is not resident here, has sufficient connection to the jurisdiction to proceed here. **related: NOTE response to civil claim rules in 3-3**

You can serve a BC action within BC as of right. To effect service for a BC action outside of BC you need either:

1. Leave of the court **[R.4-5(3)]**→ must demonstrate a real and substantial connection to BC
2. To fall within the ambit of s.10 of the *Court Jurisdiction and Proceedings Transfer Act* **[R. 4-5(1)].** Stipulates sections where a real and substantial connection is deemed to exist.

The grounds for service *ex juris* without leave include actions relating to:

- proprietary interest in property in BC
- a contract to be performed in BC or subject to the law of BC
- a tort committed in BC
- an injunction against doing something in BC

**R.4-5(2)** requires an originating pleading or petition served outside of BC without leave to state by endorsement the grounds on which service is based→ must say which ground you are relying on; can state > 1 ground

**How to serve a document *ex juris***
Provided for in *Rule* **4-6(10)** you can serve documents *ex juris*: In a manner provided for in accordance with our *Rules*; In accordance with the law of the place service is made; Pursuant to the *Hague Convention* if the state is a signatory.

***Luu v. Wang, 2011 BCSC 1240***

*Here, the plaintiff had obtained an order allowing the notice of civil claim to be served alternatively. The defendant sought to set aside the order on the basis there had been insufficient evidence to warrant the order being made. The plaintiff had sent a process server to a home owned by the defendant. The process server attended at the home three times but was unable to serve the defendant. On the second visit the process server spoke through the door with a man he believed was the defendant. In fact, it was the defendant's father who was speaking to the process server through the door. The defendant was out-of-town.*

- The court considered the appropriate test for substitutional service under the current *Rules*.
- First, the court reviewed the test under the prior Rules of Court.
- The court held there were two (although really 3) preconditions under the current *Rules*, either of which *could* justify substituted service:
    - If it is **impracticable** to serve by personal service; or
    - If the person cannot be found after a "diligent search"
    - or is "evading service".
- The definition of impracticable from the authorities interpreting the prior rules is adopted.
- **Impracticable** generally means that serving the defendant personally will be so onerous or expensive as to be more trouble or expense than is reasonably justifiable in the circumstances.
- The court holds that service has not been shown to be impracticable here since:
    - The claim was substantial (over a million dollars);
    - There was no evidence of the cost of serving the defendant in China;
    - There was no evidence that it was difficult to personally serve the defendant in China;
    - There was no evidence that reasonable steps had been taken to attempt to serve the defendant.
- In the absence of such evidence, the plaintiff failed the "**impracticable**" branch of the test.
- Moreover, the plaintiff could not say that the defendant could not be found or was evading service, since the plaintiff knew exactly where the defendant was.
- The process server's evidence that the defendant was evading service was based on the false identification of the defendant's father.
- None of the bases for substituted service was satisfied and the order was set aside.

## Pleadings and Parties

**Rule 3-7 governs pleadings generally. It applies to all of the pleadings as defined in R.1-1 [LISTED ABOCVE].**

| | |
|---|---|
| Rule 3-7(1) | **NO EVIDENCE IN PLEADINGS** |
| Rule 3-7(2) | Requires the effect of any document or conversation to be stated briefly.<br>– Not to plead the precise words of the document or conversation, unless the words are material themselves. |
| Rule 3-7(6) | Cannot plead inconsistent allegations, but R. 3-7(7) permits you to plead in the alternative. |
| R. 3-7(8) | Permits one to raise an objection in law in a pleading (eg. expiry of a limitation period). |
| R. 3-7(9) | Allows one to plead a conclusion of law if the material facts are pleaded. |
| R. 3-7(12) | Requires in a pleading after the notice of civil claim that a party specifically plead any matter of fact or law that:<br>• The party alleges makes a claim or defence not maintainable.<br>• If not specifically pleaded may take the other party by surprise.<br>• Raises issue of fact not arising out of the preceding pleading. |
| R 3-7(15) | if a denial is made you cannot do so evasively, but must answer the point denied. |
| R 3-7(16) | Deals specifically with the effect of a bare denial in respect of a contract.<br>The contract itself is denied, not the legality, terms or sufficiency of the contract. BG: if you issue a bare denial, failing to plead your own version of the terms, you have lost the scope to make an issue of the terms themselves |

**PLEADINGS ARE**: Written statements exchanged by the parties to an action that: Identify the **parties**, **events** and **facts** giving rise to the lawsuit; Identify the **issues** in dispute; Identify the **legal nature** of the **claims** and **defences**; and Set out the **relief** sought by the parties

**Rule 1-1(1)** defines pleading as the following 5 things:

**NOTICE OF CIVIL CLAIM: Rule 3-1** governs the **notice of civil claim:** As previously discussed, the notice must contain: Concise statement of material facts; Relief sought against each defendant; Concise summary of the legal basis; Proposed place of trial.

**RESPONSE TO CIVIL CLAIM: Rule 3-3** governs responses to civil claims. A defendant that wants to contest an action (thus avoiding default judgment) must file a response to civil claim in Form 1 and serve the response on the plaintiff by ordinary service.

- **Rule 3-3(2)** requires that each allegation of fact in a notice of civil claim must be admitted, denied or stated to be outside the knowledge of the defendant
- If a fact is not responded to, it is deemed outside the knowledge of the defendant. [**R. 3-3(8)]**
- For any fact **denied**, the defendant's "**version**" of the fact must be provided.
- The defendant must also plead whether the relief sought is consented to, opposed, or if no position is taken.
- If opposed, the legal basis for opposing the relief sought must be concisely stated
- **Rule 3-3(3)** sets out the timing for the Response to Civil Claim.
  - If the person served is in Canada: 21 days; If the person served is in the United States: 35 days; If the person served is anywhere else: 42 days

**REPLY:** Per **Rule 3-6**, A plaintiff may, within 7 days after the response to civil claim has been served, file and serve on all parties of record a **reply** in Form 7 that accords with **Rule 3-7**.

**Pleading subsequent to reply** (2) No pleading subsequent to a reply may be filed or served without leave of the court. (3) If no reply to a response to civil claim is served, a joinder of issue on that response to civil claim is implied. No joinder of issue (4) A reply that is a simple joinder of issue must not be filed or served.

**COUNTERCLAIM: Rule 3-7(11)** authorizes set-offs and counterclaims.

**A set-off is** a defence in which a claim back against the plaintiff is made that is intrinsically tied to the plaintiff's original claim.

- Eg. In a contract case where the vendor claims for failure to pay, the purchaser could plead a set-off on the basis that because of late delivery the goods were worth less, and the damages should be reduced by the value of the set-off.

**Counterclaim** is similar, but it is a **stand-alone** claim that could be brought by a defendant as a separate action.

- Eg. In the same contract dispute, the defendant could bring a counterclaim **for damages** for late delivery as an independent breach of contract.
- The practical difference is that if the plaintiff's claim is dismissed or discontinued, the set-off falls away, but a counterclaim continues [because it is a stand alone claim!].

**Rule 3-4** governs counterclaims: a standalone claim which could be brought by the defendant in a separate action but which is brought within the existing action for the sake of convenience

- **Rule 3-4(2)** permits the counterclaim to join someone other than the plaintiff if it is necessary to bring a claim against the plaintiff and another.
- **Rule 3-4(3)** deals with the identification of the parties in a counterclaim.
- **Rule 3-4(4)** provides a counterclaim must be filed and served on all parties of record.
- If the counterclaim is brought against someone other than the plaintiff, you must personally serve the counterclaim and a copy of the filed notice of civil claim.

**RESPONSE TO A COUNTERCLAIM: Rules 3-4(5)** and (6) Response to Counterclaim is governed by the same Rules as responding to a Notice of Civil Claim. **Rules 3-4(7)** a counterclaim can continue even if the plaintiff's claim is stayed, discontinued or dismissed. ALSO: **THIRD PARTY NOTICE; RESPONSE TO A THIRD PARTY NOTICE**

## Particulars

Particulars are the detailed facts on which a claim is based, and particulars are dealt with in Rule 3-7(18) to (24)

- Particulars are the facts another party may need to know to understand the case against it.

The purpose of particulars are explained in ***Camp Development Corporation v South Coast BC Transportation Company:***

- To **inform** the other side of the nature of the case to meet;
- To **prevent** the other side from being taken by surprise;
- To **enable** the other side to know what evidence would be required;
- To **limit the generality** of the pleadings;
- To **limit the issues** to be tried; and
- To tie the hands of the party so as **not to be able to raise new issues**.

Per ***Camp Development:*** The court described the test for whether particulars should be ordered as whether, **"it is necessary to delineate the issues between the parties**" with reference to the specific purpose of particulars.

Court also concluded in that case that matters that would have to be subject to evidence and assessment, rather than existing fact, were not appropriate for an order for particulars.

**Rules for particulars**

| | |
|---|---|
| Rule 3-7(18) | Makes pleading particulars mandatory for claims in misrepresentation, fraud, breach of trust, willful default or undue influence. |
| Rule 3-7(20) | Further particularss may be served after they become known |
| Rule 3-7(22) | Authorizes the court to order a party to deliver further and better particulars.<br>**Test, per *Camp Development:* are the particulars necessary to delineate the issues between the parties**" with reference to the specific purpose of particulars. |
| Rule 3-7(23) | Requires a demand be made in writing of the other party before bringing an application for further and better particulars. |
| Rule 3-7(24) | Provides a demand for particulars does not operate as a *stay* of proceedings, but a party can apply for one. |

***Camp Development Corporation v. South Coast British Columbia Transportation Authority, 2011 BCSC 355***

The plaintiff brought a claim for compensation for expropriation of property used to construct the Golden Ears bridge.
The defendant sought numerous particulars of the damages claimed.
Court enumerated purpose [above] + test for whether further particulars should be ordered
Here, the court went through the particulars demanded and essentially concluded that particulars of actual costs incurred to that point should be provided.
Matters that would have to be the subject of evidence and assessment, rather than existing fact, were not appropriate for an order for particulars

# Parties

## MULTIPLE CLAIMS AND PARTIES

**Rule 22-5(1)** provides that a plaintiff can join several claims in the same proceeding.
**Rule 22-5(2)** allows a plaintiff to name two or more defendants in a single law suit as long as:

- there is a common question of law or fact;
- common relief sought arising out of the same transaction; or
- the court grants leave to do so.

**Rule 22-5(6)** a party can apply to separate the trials or hearings if joining unduly complicates things.
**Rule 22-5(7**) a counterclaim or third party proceeding can be ordered to be tried separately.
**Rule 22-5(8)** two separate actions can be consolidated into one, or remain separate but be tried at the same time.

Part 20 sets out special rules for certain types of parties, including: Partnerships; disability; Representative proceedings

**Rule 20-1** deals with **PARTNERSHIPS AS PARTIES**

- Partners can be sued in the name of the firm.
- Service may be effected on a partnership by: leaving the document with a partner; or at the partnership office with someone who appears to be in charge.
- A response to a pleading must be filed on behalf of the partnership, but individual partners may file their own response and defend in their own name.
- A party can require an affidavit setting out the names and addresses of the partners at the relevant time.
- An order made against a partnership can be enforced against anyone who:
  - appeared individually;
  - was served as a partner who did not appear;
  - has admitted to being a partner; or
  - has been ruled to be a partner.

**Rule 20-2** relates to parties under a **DISABILITY**

- Any person under a disability (including an infant) must commence or defend proceedings through a litigation guardian.
- A litigation guardian must act through a lawyer, except for the Public Trustee
- If a party becomes incompetent during the course of litigation the court must appoint a litigation guardian.
- The court can remove or change a litigation guardian.
- On attaining the age of majority, the party may take over conduct of the matter if there is no other legal disability.
  - A party cannot seek to take a default judgment against a person under disability without leave.
  - The court must approve settlements on behalf of a person under disability.

## CHALLENGING JURISDICTION

The provisions for challenging jurisdiction are set out in **Rule 21-8.**

- **Rule 21-8 (1)** permits a party to dispute jurisdiction by filing a "jurisdictional response" form.
- **Rule 21-8(2)** permits a party to apply for court to decline jurisdiction after filing the jurisdictional response form.
- **Rule 21-8(3)** permits a party to challenge service after filing the jurisdictional response form.
- **Rule 21-8(5)** provides that if a party brings an application or files a pleading that challenges jurisdiction within 30 days of filing the jurisdictional response, the party does not attorn to the jurisdiction of the court.
- The party may then defend the case on its merits without attorning, pending a determination of the disputed jurisdiction.
- Any step taken other than filing a jurisdiction response form prior to disputing jurisdiction may result in attornment to the jurisdiction of the court and loss of the ability to claim lack of jurisdiction.
- If in doubt, file the jurisdictional response form and dispute jurisdiction before doing anything else in the proceeding.

## Default Judgments

**The professional obligations** with respect to default proceedings are set out in the **Code of Professional Conduct**. The Rules address the procedural issues with respect to default proceedings. **Per Chapter 7, Commentary 5→ Default proceedings**: A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

**Rule 3-8 governs default proceedings; applies where a plaintiff (or party making a claim, such as by counterclaim) has filed and served a notice of civil claim and the defendant has not responded in time.**

| | |
|---|---|
| 3-8(1) and (2) | Requirements for a default judgment:<br>• The time to file a response has passed and the defendant has not done so;<br>▪ Proof of service of the claim on the defendant;<br>▪ Proof of failure to deliver a response;<br>▪ Requisition from the registrar that no response has been filed. |
| Rule 3-8(3)] | Once a default judgment is obtained, if the claim is for a specific ascertainable amount, the plaintiff may take judgment for that amount. |
| 3-8(12) and (13)] | If the claim is for damages to be assessed, the plaintiff may take judgment and have damages assessed by trial, or by summary application. |
| Rule 3-8(11)] | The court may set aside or vary any judgment obtained by default [***Director of Civil Forfeiture; Miracle Feeds]*** |

**The test for setting aside a default proceeding is enumerated in both *Director of Civil Forfeiture* as per *Miracle Feeds:***

1. Demonstrate that his failure to file a response to civil claim was not deliberate; either:
   a. Demonstrate that he made the application to set aside the default judgment as soon as reasonably
   b. Possible after learning of the default judgment; or
   c. Provide an explanation for any delay in the application being brought;
2. Demonstrate that he has a defence worthy of investigation; and
3. Do all of the foregoing based on admissible affidavit evidence.

Listed factors are not exhaustive and failure to address one factor in the test does not doom the application to set aside a default [but then in Doe II says it could be?) tension!

### *Director of Civil Forfeiture v. Doe, 2010 BCSC 940*

*brought a claim for payment of funds paid into court in a different proceeding, alleging the funds were the proceeds of unlawful activity. D were served, default judgment issued, with a term of the default order being that the D could apply to set the order aside within 42 days of service of the default order. The D brought a motion seeking to be permitted to file a defence to the claim.*
The court adopts the *Miracle Feeds* test under the prior Rules for setting aside a default judgment [above]

- The P argued that the defendants did not bring any application to set the order aside, let alone bring it as soon as possible.
- The court holds that failure to address one factor in the test does not necessarily doom the application to set aside a default.
- The court also finds that the listed factors are not exhaustive.
- While the defendants did not *technically* bring an application to set aside the default judgment, the intent to do so was clear.
- The court finds the failure to apply to set aside the default to be a mere deficiency.
- The court cites **Rule 1-5** as justification for extending the time to apply to set aside the default judgment.

### *Director of Civil Forfeiture v. Doe, 2010 BCSC 1784*

This decision was issued after the court heard the application to set aside the same default order as was in issue in *Doe I.* The court concludes that the defendants have not satisfied the first or third factors.
The court notes there is **no admissible evidence explaining why no response was filed**; In the absence of evidence explaining the failure, the court effectively assumes that service of the claim was deliberately disregarded.
The court holds (in some tension with *Doe I*) that this failure alone is fatal to the application. In any event, the court finds the defendants have failed to demonstrate a worthy defence; A worthy defence is not satisfied by merely relying on the plaintiff's burden of proof. The defendant must show that if there were a trial the plaintiff may not be successful. **The threshold is low, but there must be some evidence of a meritorious defence.** There must be sufficient detail in the evidence to show a worthy defence.

## Amendments to Pleadings

British Columbia courts take a permissive approach to amendments. The reason for allowing liberal amendments is to ensure the real issues are determined in the litigation (i.e. there is a decision on the merits) [***TJA v. RKM***]

**Two main rules govern amendments of pleadings,** R. 6-1 **and** R. 6-2

| | |
|---|---|
| **6-1(1)** | Permits a party to amend:<br>**Once without leave** before: Service of a Notice of Trial; or A Case Planning Conference.<br>Any other time with: Leave of the court; or Consent of all parties.<br>**TEST FOR LEAVE: T**he Court will grant leave to amend unless *prejudice* can be demonstrated by the opposite party; or the amendment will be useless. Amendments are only useless in the "clearest of cases" where the pleading meets the test for striking pleadings [***TJA v. RKM***] |
| 6-1(2) and (3) | Set out the technical process for how you make and identify amendments. |
| 6-1(4) to (7) | provide for the service of and response to amended pleadings. |
| 6-1(8) | deals with amendments of pleadings in the course of trial. |
| **6-2** | Allows for a **change in the parties to an action [*must always apply here, no one free!*]** |
| **6-2(1)** to (5) | deals with changes of parties in an action arising from changed circumstances. |
| 6-2(7) | Deals with removing, adding or substituting parties.<br>• provides that at any stage of the proceeding:<br>  • A person cease to be a party;<br>  • A person be added or substituted as a party where the person ought to have been added or the person is necessary to ensure all matters can be adjudicated;<br>  • A party be added as a party where there is a question relating to that person as to the relief claimed or the subject matter of the proceeding.<br>• R. 6-2(7)(c) is subject to the proviso that it be just and convenient to add the party based on related relief or subject matter. |
| 6-2(8) | deals with the practical issues of what happens when a party is added; The originating process must be amended, and any new party served with time to respond. |

### *TJA v. RKM, 2011 BCSC 820*

*The plaintiff brought a claim in defamation. Pleadings were filed and document disclosure undertaken. The defendants sought to have the claim struck out based on an unpleaded claim of privilege. The application to strike was dismissed. The defendants applied to amend their Response to include the defences of truth, qualified and absolute privilege. The court cited the test for allowing an amendment under the prior Rules*:

"Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless."

- The reason for allowing liberal amendments is to ensure the real issues are determined in the litigation (i.e. there is a decision on the merits).
- An amendment will only be disallowed as "useless" in the clearest of cases where the pleading discloses no reasonable claim or defence.
- While the plaintiff's claim had not been struck out based on the arguments that the statements were privileged, that did not mean the defence was useless and should not be permitted.

In the result the amendments were allowedents were allowed

### *Bedoret v. Badham, 2012 BCSC 1713*

addressing whether a party should be substituted in on-going litigation where the Defendant was incorrectly named due to representations of ICBC. In short the Court held substitution should be permitted in such circumstances.

### *Broom v. The Royal Centre, 2005 BCSC 1630*

**MISNOMER** occurs where someone **deliberately misnames** a party, but describes in **sufficient detail** to indicate who party truly is Substitution of a specific D for a misnomer such as "John Doe" does not give rise to any limitation question and **may be done without leave PROVIDED THAT** John Doe is sufficiently described in the pleadings as an identifiable person or corporation, although not by name. **Ask whether party would have known who was to be sued** Additional safeguard that party must be served with the amendment even when an order isn't required, the party can apply to have the amendment struck if they are considered to be inappropriate without leave.

# Class Actions, Third Party Proceedings and Case Planning

Class actions were introduced in BC by legislation, the *Class Proceedings Act*. The legislation facilitates bringing small, but numerous related claims in one action. In this way, the action becomes more economically viable, as the legislation allowed for an action to be brought on behalf of numerous plaintiffs.

Anyone can commence a class proceeding, and you don't need permission from everyone in order to bring a claim on their behalf. However, you must obtain certification as a class proceeding, which is a **threshold question** which must be resolved before the case can proceed.

## Class Actions (Certification)

| | |
|---|---|
| Class Proceedings Act s 4(1) | Certification is mandatory If certain factors are established:<br>– There is a **cause of action**; [*not frivolous*]<br>– There is an **identifiable class**; [*court is concerned with this because of granting relief*]<br>– There are **common issues** among the class members; [*need a common question that will be decided within the class action*] See ***Tiemstra v ICBC***<br>– A class proceeding is **preferable** for the **fair** and **efficient resolution** of the common issues; and [*this is a balancing test that looks at whether or not it is the most efficient way to proceed*]→ see **section 4 (2)**<br>– There is a representative plaintiff who:<br>• can **fairly** and **adequately** represent the interests of the class;<br>• has a **workable plan** for the proceeding; and<br>• is **not** in **a conflict of interest**. |
| Class Proceedings Act s 4(2) | • Do the common questions predominate over the individual questions;<br>• Do a significant number of class members have an interest in individually controlling their own actions;<br>• Do the class proceedings involve claims that are the subject of other proceedings;<br>• Are the means of resolving the claims less practical or efficient; and<br>• Whether the class proceeding would create greater difficulties than there otherwise would be. |

### *Tiemstra v. ICBC, 1997/07/07 BCCA*

*ICBC implemented a policy where it would automatically reject claims for physio, travel where minimal damage, plaintiff brought class action—common question was that whether ICBC could just reject or needed to consider each on its merits—here that would ultimately result in individual assessment not common disposition*

The common question would not resolve the litigation because each plaintiff's claim needed to be resolved individually on its merits; thus the Court did not certify the action as a class→ the common question must be dispositive of a certain feature of the litigation

### *Rumley v. British Columbia, 1999 BCCA 689*

*Concluded that student had been abused over lengthy period of time, schools failure to prevent abuse was significant common issue*

However, the court certified a narrower class of plaintiffs, granting certification to the plaintiffs whose claim was for sexual abuse as there was no limitation period to deal with. Those who were claiming for non- sexual assault would have to deal individually with the limitation period issue. The common issue pertaining to sexual abuse claims was whether or not the school failed to prevent abuse.

Distinction in application of s 4 criteria evidence in both cases

Note that 20-3 governs representative proceedings: involves persons who have the same interest in a proceeding, whereas class proceedings are brought on behalf of a class of plaintiffs sharing a common issue of law or fact--

## Third Party Proceedings

**Third party proceedings allow a party other than the plaintiff to assert a claim against someone else for that party's liability**. A third party claim can be independent of or dependent upon the cause of action between the plaintiff and defendant, but **there must be some connection** to the underlying action. Example: A third party claim typically arises when as a defendant, you are claiming that you didn't cause the injury to the plaintiff, but someone else did. Alternatively, as a third party you can claim that you did commit harm, but it was because someone else breached a duty to you.

**WHY:** Third party proceedings are permitted to avoid multiple actions about the same subject matter, to avoid inconsistently findings, and limiting inefficiency. Ultimately the system is concerned with fairness.
Further advantages are that it allows a 3rd party to participate in defence of the underlying matter (can assert defenses that you think the defendant who brought you should raise) and ensures issues decided in proximity temporally so no party has the advantage of earlier judgment.

**Rules Governing Third Party Proceedings**

| | |
|---|---|
| 3-5(1) and (2 | permits a party, who is **not** a plaintiff, to file a third party notice against any person, whether or not they are already a party to the action. |
| R. 3-5(1) (a) to (c): | The grounds for bringing a third party claim are set out in R. 3-5(1) (a) to (c):<br>• Where the party is entitled to **contribution** or **indemnity** from the third party in respect of the claim made in the action. [*alleging someone else caused the damage*]<br>• The party is entitled to relief against the third party **relating to or connected with** the original subject matter of the action. (*ex: I caused the damage, but only breached my K because they breached their K in relation to me*)<br>• A question or issue relating to or connected with the relief claimed in the action or the subject matter is **substantially the same as the question or issue** between the party and third party and should be determined in the action. *(really rare; probably not a case where A & B wouldn't be satisfied and C would come up)* |
| 3-5(1) and (2)<br>3-5(3) | Rule 3-5(4) provides the timing, a party may file a third party notice: at any time with leave<br>without leave if filed **within 42 days** after being served with a notice of civil claim or counterclaim. |
| 3-5(7) | You must serve on the third party **within 60 days** of the third party notice being filed:<br>The third party notice itself; and<br>If they were not previously a party, all other pleadings delivered by any party.<br>You must promptly serve on all other parties a copy of the third party notice. |
| 3-5(8) | Authorizes the court to set aside third party notice<br>**Test for granting third party leave: 3P must establish that the 3P notice discloses no cause of action/bound to fail** |
| 3-5(9) | the third party responds just like a defendant unless 3-5(10) applies<br>*-doesn't happen that often, usually your statement of claim won't cover all allegations in third party notice* |
| 3-5 (10) | (10) A third party who is a defendant in the action need not file or serve a response to third party notice and is deemed to deny the facts alleged in the third party notice and to rely on the facts pleaded in that party's response to civil claim if all of the following apply:<br>(a) the third party notice contains no claim other than a claim for contribution or indemnity under the*Negligence Act*;<br>(b) the third party has filed and served a response to civil claim to the plaintiff's notice of civil claim;<br>(c) the third party intends, in defending against the third party notice, to rely on the facts set out in the third party's response to civil claim and on no other facts. |
| 3-5 (11) | Provides the rules apply as if it were a claim and response. *Same timeline for filing as if it were a defendant* |
| 3-5 (12) | a third party can file a response to civil claim and raise any defence open to a defendant. |
| 3-5(16) and (17) | default judgment is available if a third party does not respond in time. |

**Unnecessary Third Party Proceedings per *Adams; Laider***

**BRANCH 1:** A defendant may not bring a third party claim against some person with respect to an obligation belonging to the plaintiff which the defendant can raise directly against the plaintiff by way of defence, There are two main scenarios where this would happen, where harm allegedly caused by 3P was wi an agency relationship [plaintiff responsible for actions of agent, or claim is that 3P failed to help plaintiff mitigate their loss (mitigation always responsibility of plaintiff)

**BRANCH 2:** Where pleadings raise the possibility that the defendant may have a independent claim against 3P, the 3P claim will be allowed to stand [**courts assume truth of facts pleaded when deciding to grant leave]**

## Negligence Act

Negligence Act s. 4 provides that where loss is caused by two or more persons the degree of fault is to be allocated. Where two or more people are found at fault they are deemed jointly and severally liable to the plaintiff for the **full amount**. But each wrongdoer can then seek indemnification from the others in accordance with the apportioned liability. Amount that you can pursue from other defendants is related strictly to the amount that they are allocated

- Policy: plaintiff shouldn't be left with no judgment because one of the defendants doesn't have enough money; but can work an effective unfairness for someone who is only slightly liable

So under the *Act* a wrongdoer may have to pay the whole amount to the plaintiff, regardless of their degree of fault, and then seek indemnity from the other wrongdoers.

Claims for contribution or indemnity under the *Negligence Act* **are brought by third party notice**, except as against a plaintiff.

**EXCEPTION**: as a against a plaintiff, a defendant includes in the Response a defence based on a claim of contributory negligence.

**Joint tortfeasors are those that:**

- truly act in concert with a common purpose;
- where one is a principal of or vicariously responsible for the other; or
- jointly have a duty imposed on them together.

**Concurrent tortfeasors are not joint tortfeasors,** but rather are those that act separately but whose torts together contribute to the damage caused.

**SETTLEMENT AGREEMENTS & JOINT AND SEVERAL LIABILITY UNDER THE NEGLIGENCE ACT**

**Per *Tucker v Asleson***, the plaintiff's release of one several tortfeasor from liability through settlement doesn't release the other several co-tort feasors from liability. Thus joint and several liability per section 4(2)a of the *Negligence Act*. This means that the plaintiff is still free to enforce 100% of the judgment against the defendant who remained in the action, thus the non-settling defendant can go after the defendant who settled to seek contribution and indemnity.

***BC Ferries*** came up with the solution, parties can still dispose of ***joint and several liability*** by executing a BC Ferries Agreement . The Court in ***BC Ferries*** clarified that a defendant can only get contribution and indemnity from a co-tortfeasor under 4(2)b for the part of the plaintiff's damage which the defendant did not cause but yet was compelled to pay under that section.

So if the plaintiff settles with one co-tortfeasor and does not seek from those who remain in to defend the action, that portion of the damages for which the settling co-tortfeasor was at fault, then ***joint and several liability*** is effectively severed between the settling co-tortfeasor and the defendants remaining in the action. This is usually accomplished in a BC Ferries Agreement by the plaintiff agreeing not to seek the portion of the losses attributable to the settling tortfeasor from the defendants remaining in the action and to advise the court that it waives its right to recover from the defendants remaining in the aection the portion attributable to the settling co-tortfeasor.

There is an element of risk associated with pre-judging the risk the Court will assign!

### *Laidar Holdings Ltd. v. Lindt and Sprungli (Canada) Inc., 2012 BCCA 22*

*Plaintiff leased property in Vancouver to the D who wanted to use it for selling/dist., found out that the zoning didn't permit it, wouldn't take possession or pay, then the P sued for the rent, and the D coutner claimed for breach of lease/misrep. D brought third party claim against leasing agents, and then the leasing agents sought to bring a claim against Blakes who they had been represented by ("fourth party notice") on the basis that they had failed in their duty to Lindt*

**At issue:** whether the "fourth party" claim could be brought against Blakes, or if it fell within the "first branch" of ***Adams v. Thompson.***

FIRST BRANCH: **In *Adams*, the court held that a third party claim is not permissible where the claim could effectively be raised as a defence against the plaintiff's claim.**

On that basis, a third party claim is barred in two circumstances:

- Where the claim against the third party is legally attributable to the plaintiff because of an agency relationship.
- Where the claim against the third party is for failing to assist the plaintiff in mitigating the damages.

Mitigation is always the plaintiff's responsibility, so failure to mitigate can be addressed as a defence.

SECOND BRANCH: of *Adams,* is the corollary of the first: **where claim against the third party may not be responsibility of the plaintiff, claim will be permitted to stand.**

**HELD:** There is no claim on the pleadings that Blakes owed an independent duty to DTZ.

Since DTZ is alleging that Blakes breached a duty to Lindt which clearly fell within the agency relationship between Blakes and Lindt, the "first branch" of Adams applies

The court concluded, without deciding definitively, that the solicitors advice likely fell within the agency relationship.

### *Steveston Seafood Auction Inc. v. Bahi, 2013 BCSC 1072*

**Test for granting third party leave: 3P must establish that the 3P notice discloses no cause of action/bound to fail**

Applies the principles set out in ***Laidar***; The plaintiff claimed that its bookkeeper, Bahi, had defrauded it of $860,000. The D&H defendants were accountants that were involved in the preparation of the plaintiff's financial statements. The plaintiff claimed against the accountants for failing to discover the fraud.

D&H sought to bring third party claims against Bahi as well as the directors of the plaintiff, alleging that the **proposed third parties had made misrepresentations to D&H.**

- D&H pleaded that the proposed third parties owed D&H a duty of care to both the plaintiff and D&H directly.
- The proposed third parties argued the allegations by D&H against them were all in their capacity acting for the plaintiff [arguing against independent duty].
- **Therefore, the proposed claims [Bahi + plaintiff's directors] could be pleaded as a defence, rather than a third party claim.**
- The court holds the **test for granting leave to bring the third party** claim is analogous to R. 9-5 [test to strike out pleadings**], the third parties must establish that the third party notice discloses no cause of action and is bound to fail**
- The facts pleaded are assumed to be true for the purposes of the application. [as in 9-5]
- D&H had pleaded an independent duty owed by the proposed third parties to D&H.
- Since it was pleaded that the proposed third parties owed a duty directly to D&H and breached that duty by making misrepresentations, the third party notice was allowed to proceed.

### *Tucker v. Asleson, (BCCA 1993)*

**The release of one concurrent tortfeasor through settlement does not release the others, and the others could still conceivable claim against the one that has settled, short of a BC Ferries agreement**

*Infant plaintiff is badly injured when her car slides over the line and hits another car*

At trial liability is found: 1/3 to mother driving one car; 1/3 to the Crown for its failure to sand the roads; and 1/3 to the driver who was struck while driving on his own side of the highway

- Prior to the trial the plaintiff settled with her mother and the insurer. On appeal the second driver's liability is overturned, leaving the Crown with 2/3 fault.
- Crown appealed contending that the settlement severed the joint and several liability provided for in the *Negligence Act*.

- The Crown originally appealed because pursuant to the *Negligence Act,* it was on the hook for the full amount of the damages, less whatever the plaintiff had already been paid under the settlement, with a right of indemnity from the other driver.
- With the revised damages assessment the issue is more academic.
- **Joint tortfeasors are those that:**
    - truly act in concert with a common purpose;
    - where one is a principal of or vicariously responsible for the other; or
    - jointly have a duty imposed on them together.
- **Concurrent tortfeasors are not joint tortfeasors,** but rather are those that act separately but whose torts together contribute to the damage caused.
- An employer or a co-conspirator are joint tortfeasors.
- Two negligent drivers are concurrent tortfeasors
- For truly joint tortfeasors there is likely no division of fault and release of one releases them all. [*as between them no right of contribution and indemnity; plaintiff choose to go after whoever they want*]
- **A release of one concurrent tortfeasor does not release the others**. A concurrent tortfeasor is liable to the plaintiff for the whole amount of the loss, subject to deduction for amounts received.
- **The tortfeasor is left with a right to seek indemnity from the other tortfeasors.**

**Issue with this case!** Resulted inno advantage to coming to a settlement in multi-party litigation, because if the other defendant introduced a third party motion against you, you could still be on the hook after settling with the plaintiff.

### *B.C. Ferry Corporation v. T&N, (BCSC 1993)*

**When plaintiff only seeks that part of its loss from a defendant which the defendant actually caused, the defendant has no claim for contribution and indemnity against another party which also caused part of plaintiff's loss.**

P settles with one party, in settlement, P agreed not to seek to recover any portion of loss attributable to third party from the Ds and to advise the court that it waived any amount from the D attributed to the third party.

**At issue:** Third party proceeding against the installers appropriate?→ NO

**R**: A D may claim for that part of the P's damage it did not cause yet was compelled to pay. **If the P elects only to claim from one D that portion of the loss that the one D caused, that D can have no right to ask third party to contribute b/c the D is only called upon to pay part of the damage that it caused and no more.** Principle in Tucker isn't violated here because the P only seeks the part of its loss actually caused by the D.

- Because P can only sue D for its contribution to the loss, it could never be found liable of any amount attributable to third party

Only way that third party would have to pay any amounts owing after this case is by D shifting its liability to it → not allowed

## Case Planning and Case Management

Expanded case planning was intended to be a significant aspect of litigation under the new Rules.
TWO WAYS FOR CPC to be triggered:
1) **Rule 5-1** provides that any party may request a case planning conference once the pleading period has expired.
2) The court can also direct a case planning conference be held. [**Rule 5-1(2)]**
TIMELINE: The first case planning conference requires 35 days notice, and then 7 days thereafter. [**Rule 5-1(3)**]
Once a case planning conference is requested each party provides a case plan setting out its proposal for the various steps in the action. [**Rule 5-1 (5)** and **(6)**]
The plaintiff must provide its case plan within 14 days after the notice of case planning conference. The other parties must provide their case plans within 14 days after receipt of the plaintiff's case plan.
Case planning conferences must be attended by each lawyer representing a party of record, and any unrepresented parties. [**Rule 5-2(2)]**
Must attend the first conference in person, and thereafter, in person or by phone or videoconference.
Failure to attend can have **costs consequences** [**Rule 5-2(6)**] (not default judgment)

- A court has **broad powers** to control the conduct of the action at a case planning conference. [**Rule 5-3(1)**] However, a court cannot hear any application that requires evidence except under (6), or make an order for final judgment except by consent. At the end of the conference, a case plan order is issued.

If a party fails to comply with a case plan order or the case planning part generally, the court may:

- make an order under **R. 22-7** (non-compliance order); and/or
- order costs.

Case plan orders can be amended by consent or by application. [**Rule 5-4(1)**]

### *Parti v. Pokorny, 2011 BCSC 955*

**Must be compelling ground to order transcript of CPC, their purpose is to have a full and candid discussion of important aspects of an action, and protected thus by settlement negotiation privilege**

- Following a Case Planning Conference, ICBC applied for permission to have a transcript of the conference produced.
- ICBC wished to have the transcript for precedential and training purposes, not for any reason related to the litigation.
- In determining whether to permit a transcript, the court considered the nature and purpose of CPCs.
- The court held that the purpose of the CPC was to have a **full and candid discussion of a number of important aspects of an action.**
- The court is wary of permitting an "unguarded comment" made in the course of such a discussion being used against a party.
- **Discussion of settlement at a CPC may be protected by settlement negotiation privilege.**
- Even without that privilege, there should be "compelling ground" to order transcription of CPC proceedings.
- This approach is to foster frank discussion in CPCs.

### *Stockbrugger v. Bigney, 2011 BCSC 785*

A case plan order can now be filed by consent, which accords with the objectives of the Rules. just, speedy efficient decisions on the merits

# Discovery and Inspection of Documents

Document disclosure is one of the most significant steps in virtually every action. It begins after the pleading phase ends. The purpose of discovery is to gather information about the case [getting to know both sides and narrowing what is in dispute.] Document disclosure is governed by **Rule 7-1**. ***Hodgkinson:*** CJBC noted the importance of full disclosure and the goals disclosure serves: to prevent ambush; and to foster settlement.

In the old rule, document disclosure took place on a '**relevance'** standard, which had the advantage of being less likely to miss anything, but the disadvantage is receiving warehouses of documents, now a **material fact** standard.

Document disclosure should also be considered in the context of **Rule 1-3**; the balancing factors v full exploration of the truth [recall to CJBC McEachern speech]. The purpose of full disclosure, per McEachern CJBC is to prevent ambush and to foster settlement.

ETHICAL OBLIGATIONS: Counsel have an ethical obligation to ensure all documents that may prove or disprove a material fact are disclosed at "Stage 1", as well as any further disclosure ordered or agreed to at "Stage 2". Take the most steps that you reasonably can and make the best effort you can and document that you have done it.

Per ***Myers v Elman:*** **Solicitors have a duty as an officer of the court to investigate and as far as possible ensure that document disclosure is properly provided.** Qualified by reasonableness with practical circumstances

**"STAGE 1" MANDATORY DISCLOSURE:**

**Rule 7-1(1) requires** all parties to provide a list of documents **within 35 days of the end of the pleadings stage of the action.** Document defined as: has an extended meaning and includes a photograph, film, recording of sound, any record of a permanent or semi-permanent character and any information recorded or stored by means of any device

**STANDARD FOR DOCUMENT DISCLOSURE**: Instead of old relevance standard, now one must list all documents that: **are or have been in the party's possession or control** [able to compel its delivery] **and that could, if available, be used by any party of record at trial to prove or disprove a material fact** [material facts are defined by the pleadings] and all other documents to which the party intends to refer at trial.

The list must include a brief description of the document listed. **[R. 7-1(2)]**

- ***GWL Properties:*** The list must provide a meaningful, reliable and complete disclosure and effective aid to retrieving the documents on inspection**.**

**YOU MUST ALSO DISCLOSE**:

- **Any insurance policy that may be triggered by a judgment** [policy: *this is to help facilitate settlement; P can know what the insurance policy is and how much they might claim; but court won't decide based on availability/ unavailability of insurance]*…but policy is not to be disclosed to the court unless it is relevant. **[R. 7-1(3) and (4)]**
- Privilege must be claimed in the list.
  - Must provide sufficient detail to allow the other side to assess the claim; but
  - Without disclosing any privileged information. **[R. 7-1(6) and (7)]** [*can also claim privilege over part of the doc*]
- There is an obligation to supplement a list of documents; **disclosure is an ongoing obligation**. [**R. 7-1(9) (a)** if it comes to the attn. of the party serving ti that the list is inaccurate or incomplete, or (b) a document comes into their possession that could prove or disprove a material fact
- The court can order a party to swear an affidavit verifying the list of documents. **[R. 7-1(8)]**

**Reflection on the change from the previous rule**: now: determining whether a document should be disclosed involves some **analysis**. Thus, the change from the relevancy standard has shifted who does the work; but doesn't necessarily reduce the amount of work. It really shifts the cost of reviewing a part's documents to the party itself not to the opposing party. Can also make life difficult in terms of professional obligations wrt to document disclosure. There was less risk that your judgment may be called into question under previous standard. NOW: clients may push you; especially ones that are savvy and understand that there is more grey area

**"STAGE 2" DISCLOSURE**

A party can demand disclosure of documents that it says **ought to have been included in the list. [R. 7-1(10)]**

- A party can demand additional documents provided they are described with i) reasonable specificity and ii) the reason for their disclosure is given. **[R. 7-1(11)]**
- In response to a demand under **R. 7-1(10)** or **(11)** a party must respond **within 35 days** and either:
  - Comply and make a supplementary list;
  - Comply in part; or
  - Provide an explanation why the documents or some of them are not being disclosed **[R. 7-1(12)]**
- If the parties are still at **odds an application can be brought for the further documents. [R. 7-1(13)]**
- Parties must allow inspection and provide copies of listed documents. **[R. 7-1(15) and (16)]**
- Rule **7-1(18)** permits an application for documents from a non-party.
- The effect of the failure to disclose is set out in **R. 7-1(21).**
- Failure to disclose can also trigger consequences under **R. 22-7**, [*up to and including your claim and defence; most often results in a costs order*]

**PURPOSE TO TWO STAGE DISCLOSURE**: give effect to the idea of proportionality [efficiency, timeliness and cost]. The salutary objects of **Rule 7-1 (10)-(14)** are to promote dialogue amongst the parties, informal resolution of document production, disagreements over where it is possible and where it is not; winnowing proper scope of correspondence [***XY, LCC V Canadian Topsires Selection inc.***]

**Examination for discovery also useful tool to find out what else is out there!** But not necessary before seeking further disclosure

**Can you ever get the OLD RELEVANCE STANDARD?**

In accordance with the inherent jurisdiction of the Court, it is possible you could ask for **relevance standard** under **7-1 (11**); in limited cases, where proportionality concerns are not engaged, and which a party will be able to establish that it either cannot or should not be required to identify with specificity the full range of document that it seeks ***XY, LCC V Canadian Topsires Selection inc.*** Most likely to arise in the context of fraud or conspiracy

**DISCLOSURE FOR THIRD PARTIES: 7-1 (18)** provides for disclosure of a document that is in the control of a person who is not the party of record, The court may make an order for a production, inspection and copying of such a document. the rule does not specifically say so, **the test for non-party disclosure is the same materiality test**. It would be inconsistent with the purpose of the rules to be the old relevance test. **R. 7-1(18)** should be interpreted consistently with the rules governing disclosure between parties [***Kaladjian v. Jose***]

**If the materiality test is met:** production will be ordered **unless** the document is privileged or the interest of the non-party may be embarrassed or adversely affected. Post- ***Kaladjian*** non party interests presumed to hold: before refusing to order production on the grounds it may embarrass or adversely affect a non-party, the court must, per ***Dufault v. Stevens***

- weigh the probative value of the document against the negative affect on the non-party, and
- determine whether it is more just to require production or not.

### *G.W.L. Properties v. W.R. Grace, (BCSC 1992)*

**While there is some flexibility in how to describe documents, the list must provide a meaningful, reliable and complete disclosure and effective aid to retrieving the documents on inspection.**

*The defendant had provided a list that had 621 documents itemized by date, then a list of 460 boxes with no description other than the number of documents in the boxes. The plaintiffs were provided access to the boxes, but complained there was no order to the boxes. In the application the fact emerged that there was a 25,000 page list of 12 million documents and a list of 40,000 privileged documents. The 12 million documents had been reduced to 1 million producible documents, which were comprised of the 460 boxes.*

- **At issue:** whether the defendant had deliberately concealed documents and provided an insufficient list of documents.
- The plaintiffs sought to have the defendant's statement of defence **struck out for having misled the court.**
- The court refused to strike out the defence finding that there was no deception as there was no specific list of the 1 million documents in the 460 boxes; not an outright lie
- The court did order that the existing lists must be produced and the plaintiffs also sought a further and better list of documents.
- The defendant resisted on the basis that listing the documents in detail would be onerous.
- **The court held that a list was possible to be prepared** [they had done it for 12 million after all], **and that the Rule requires for a list to provide**:
  - An ordered enumeration of the documents; and
  - Some description of all relevant documents.
- There is flexibility in how to satisfy those requirements, including grouping documents.
- Here, the defendant was required to list all relevant documents, and provide an affidavit verifying the list.

### *Myers v. Elman, (H.L. 1940)*

**Relevance: illustrates the professional and ethical obligations of counsel in regards to document disclosure.**

*The client swore a false affidavit of documents. The solicitor was found to have been guilty of professional misconduct for allowing such an affidavit to be sworn. The court held it did not matter in this case whether it was evident on the face of the affidavit or not that documents had not been disclosed because the solicitor had not reviewed the affidavit in any event*.

- In essence, a solicitor's obligation goes beyond just leaving it to the client; The court finds that a client cannot be expected to realize the scope of document disclosure obligations.
- **Solicitors have a duty as an officer of the court to investigate and as far as possible ensure that document disclosure is properly provided.**
- Solicitor cannot allow the client to make whatever affidavit the client believes fit. [*Can't just describe disclosure and leave it to the client to see what should or shouldn't be disclosed*]
- Dilemma for counsel: clients have the knowledge of what they have or don't have; what do you do in ex: circumstances where there is 12 mil; how do you make sure that they disclose what is materials? Well you might have to review them all yourself
- **Under the new formulation for document disclosure, counsel have an ethical obligation to ensure all documents that may prove or disprove a material fact are disclosed at "Stage 1", as well as any further disclosure ordered or agreed to at "Stage 2".**
- **Ex:** practical circumstances where you have a duty to sufficiently investigate, qualified by reasonableness with practical circumstances where the documents may be far away, not in good order, damaged→ these scenarios all test that obligation
- **BG:** suggests, in practice: take the most steps that you reasonably can and make the best effort you can and document that you have done it. This is an area that is sometimes difficult for counsel in the past under the relevance standard where we could say "if it relates at all to this matter"; now this standard is harder to explain, and consequently harder for you to ensure that it has been satisfied

***Kaladjian v. Jose, 2012 BCSC 357***

**In non-party disclosure, material fact standard is now applicable in accordance with the purpose of Rules**

*Plaintiff refused to hand over MSP claim history on basis that it could not prove or disprove a material fact in the context of an MVA damages issue [injuries pre-existing or not] Rather than demand the document from the plaintiff under **R. 7-1(10)** or **(11)**, the defendant sought non-party disclosure from the province. The order for disclosure of MSP records was denied as the plaintiff had already produced her medical records from the time of the prior accident. There was no suggestion the plaintiff had seen a physician other than her regular doctor whose records had been disclosed. The defendant would be able to explore and obtain evidence of the materiality of any further records at an examination for discovery.*

Held: Appeal dismissed

- On appeal, **the defendant argued that the threshold for disclosure of a document from a non-party should be the old relevance standard, and not the R. 7-1(1) materiality standard.**
- Court: while **R. 7-1(18)** had virtually the same language as the prior **R. 26(11),** the document disclosure regime itself had changed.
- The court noted that at **("Stage 1 Disclosure")** a party is obligated under **R. 7-1(1)** to disclose documents that could be used to prove or disprove a material fact.
- The current Rules also provide for a process to obtain broader disclosure under **R. 7-1(11) to (14).** **("Stage 2 Disclosure")**
- The purpose of the two-stage document discovery process is to give effect to the objectives of the Rules, particularly by applying the concept of proportionality.
- The court finds that it would be **inconsistent with the purpose of the Rules** if the test for disclosure for parties was the narrower materiality test, but for non-parties it was the old relevance test.
- The court described the differences between and processes **under R. 7-1(10**) and **7-1(11**), and concludes that R. 7-1(18) should be interpreted consistently with the rules governing disclosure between parties
- **The court notes that the scope of document disclosure and examinations for discovery is no longer the same.** Rather in discoveries the parties may canvass matters of potential relevance [may lead you to a material fact], while document disclosure at Stage 1 is **limited to documents which are material.**
- The pleadings generally govern Stage 1 disclosure as to what is "material".
- To obtain broader "relevance" disclosure under **R. 7-1(11)** or **R. 7-1(18**) **will generally require some evidence in support of the application.** Such evidence will restrict "fishing expeditions" and permit a consideration of proportionality.
- Such evidence can be obtained at an examination for discovery.
- The court **highlights the importance of a party's privacy and notes that medical records ought to remain private unless it is established that disclosure is necessary for the litigation.** [*although privacy is not generally a concern as parties are assumed to have waived it for a degree by entering into the litigation*]
- The court finds there should be little concern about parties not disclosing material documents because: Such matters can be explored on examination for discovery; and Counsel, acting responsibly as officers of the court will be in the best position to assess materiality and ensure proper disclosure.

***XY, LLC v. Canadian Topsires Selection Inc., 2013 BCSC 584***

***it is possible you could ask for relevance standard under 7-1 (11); in limited cases, where proportionality concerns are not engaged, and which a party will be able to establish that it either cannot or should not be required to identify with specificity the full range of document that it seeks.***

*XY owned tech permitted sex selection in cattle breeding. In an earlier action, the court had found that a licencee of the technology had breached a licencing agreement and conspired to disclose XY's confidential information. Some defendants from the prior action were also defendants in this action. In the prior action the defendants had failed to produce material documents and some had been deliberately altered. As a result of these circumstances, XY applied for disclosure of relevant (rather than material) documents without having describe them with particularity as required for "tier two" disclosure. The court discusses the difference between "materiality" and "relevance" in document disclosure.*

- **At issue:** Is a *Peruvian Guano* standard of disclosure is ever available under the current Rules?

- The two-tier process for disclosure is meant to foster proportionality and cooperation between counsel. The first stage of disclosure is meant to be tailored to the pleading of material facts. The second stage is broader, but discretionary and with pre-conditions.
- In theory such disclosure of all "potentially relevant" documents may still be available.
- The court notes that **there could be relevant documents that a requesting party is unaware of and cannot identify, particularly in cases of fraud or conspiracy**.
- The requirement to identify documents with "reasonable" specificity is a flexible standard, **thus there may be limited cases where proportionality is not a concern and where a party establishes it cannot identify with specificity the range of documents that should be disclosed.** [court can do this by exercising its inherent jurisdiction]
- While generally evidence is required as to the existence of additional discloseable documents, such evidence will not always be available to a party.
- **The court must be wary of fishing expeditions**, **but also of impeding discovery of documents.**
- Examinations for discovery can provide evidence in support of a documents application, but it is not necessary to do discoveries before seeking further disclosure.
- The duty of counsel to ensure proper document disclosure is emphasized.
- Here, XY contended that identifying with specificity the documents it wished to have disclosed would allow the defendants to destroy or falsify them. [there has been a prior history of that happening→ can only allege alterations of documents if there is some basis; Court finds this fairly compelling]
- However, an Anton Piller order had already resulted in the safekeeping of many documents.
- Any further documents that did not fall within the Anton Piller order would have to be reviewed by the defendants' solicitors in any event.
- Consequently**, XY could identify the further document sources to the solicitors for the defendants and count on their duty as counsel to ensure those documents would be produced and not destroyed.**
- Here, there was no reason for XY not to comply with the requirements of R. 7-1(11) given the circumstances.

### *Dufault v. Stevens and Stevens, (BCCA 1978)*

**Relevance for the characteristics for non-party disclosure**

*An appeal from refusal by Chambers judge to order defendant entitled to non-party disclosure of documents that the plaintiff was granted the right to receive. The plaintiff sought documents from a hospital and medical services providers relating to her own medical records. The defendant did not oppose but wanted the same disclosure contemporaneously.*

- The court held the intent of then **R. 26(11),** current **R. 7-1(18**) was to provide a party with the means of obtaining production and inspection of documents from non-parties **provided it can establish that the document is relevant.**
- The application cannot be a "fishing expedition".
- If the applicant shows the documents are relevant on the *Peruvian Guano* test, the court will order production by the non-party, unless there are reasons not to, such as:
  - The document is privileged.
  - The interest of the **non-party** may be embarrassed or adversely effected.
- BUT: The non-party's interest is not overriding
- After *Kaladjian* the *Peruvian Guano* test no longer applies. Presumably, the non-party's interests are still a consideration.
- The court holds that before refusing to order production on the grounds it may embarrass or adversely affect a non-party, the court must:
  - weigh the probative value of the document against the negative affect on the non-party, and
  - determine whether it is more just to require production or not.
- Here, the court holds the defendant should have production of the documents as there was no claim that the hospital may be embarrassed by production.
- The only potential embarrassment was the plaintiff's and that was not a basis for refusing production as she was a party to the litigation. The documents were certainly relevant.

## Privilege

Privilege is the principal exception to the obligation to disclose material documents. Parties are not however, exempt from listing the documents. It is necessary to list each document for privilege individually [***Leong***] The overriding concern if the privilege list is challenged in not revealing information that is privileged; **must err on the side of privilege**. Can bring an application for court to review the description/document to ensure it was done properly [***Leong***] A party asserting that a document is privileged bears the onus of establishing the privilege [***Keefer***].

Privilege over documents is broken into related sub-classes:

| | |
|---|---|
| **SOLICITOR CLIENT COMM.** | Cover communications between lawyer and client.<br>**TEST**: [***Keefer***]<br>• Is it a communication between lawyer and client;<br>• Does the communication entail seeking or giving legal advice; and<br>• Is the communication intended to be confidential |
| **LITIGATION PRIVILEGE** | Litigation privilege covers documents created for the dominant purpose of litigation, although the documents need not be confidential. Litigation privilege applies to communications and documents between clients and third parties, the dominant purpose of which is litigation [***Keefer***].<br>Litigation privilege extends to documents produced by a party or another agent of the party.<br>**TEST: whether the sole or dominant purpose of creating the document was to obtain legal advice in current or probable litigation** [***Shaughnessy Golf & Country Club***]<br>**To establish litigation privilege a party must show:**<br>• Litigation was ongoing or reasonably contemplated when the document was created; and<br>• The **dominant purpose of the document was litigation,** based on an examination of all of the circumstances and the evidence filed in support of the claim of privilege.<br>• **Affadavit evidence should be filed in support of the claim of privilege [*Keefer*]**<br>***Hunt v. T & N Plc***<br>There is an implied undertaking of confidentiality with regard to documents disclosed in litigation. The rule now is there is an obligation on a party obtaining discovery of documents requiring the party to obtain prior to using documents other than in the proceedings:<br>– The owner's permission; or<br>– Leave of the court; |
| **SOLICITOR BRIEF PRIVILEGE** | PER: ***Hodgkinson v. Simms***<br>• The purpose of solicitor's brief privilege is held to be to ensure people can retain a lawyer and communicate fully without the concern that the other side will pry into those communications.<br>• TEST: **whether the document or communication was brought into existence with the dominant purpose to obtain legal advice or aid in the conduct of litigation.**<br>• Where a lawyer exercises legal knowledge, skill, judgment and industry to assemble a collection of relevant documents for litigation, privilege will attach<br>• **PURPOSE**: Lawyer's brief privilege is intended to prevent a party from seeing the strategy of the other side. This privilege allows a lawyer to make full investigation and properly prepare for litigation.<br>• **Affadavit evidence should be filed in support of the claim of privilege [*Keefer*]** |

### *Hodgkinson v. Simms, (BCCA 1988)*

*The plaintiff's solicitor did a lot of investigation and obtained copies of document. Defendant knew from the privilege list that the documents existed, and sought disclosure. The plaintiff argued that the defendant could obtain the documents themselves and allowing the defendant to inspect the documents would provide insight into the plaintiff's strategy. The defendants argued that the original documents were not privileged, and the copies cannot become privileged just because a lawyer takes a copy.*

- McEachern CJBC for the majority noted the importance of full disclosure and the goals disclosure serves:
  - To prevent ambush; and
  - To foster settlement.
- The majority finds that there can be no concern of ambush here where the defendants could just as easily make inquiries and obtain the documents.
- The purpose of solicitor's brief privilege is held to be to ensure people can retain a lawyer and communicate fully without the concern that the other side will pry into those communications.
- Consequently, solicitor's brief privilege is another branch of privilege fostering solicitor client communications.
- **The test for solicitor's brief privilege is whether the document or communication was brought into existence with the dominant purpose to obtain legal advice or aid in the conduct of litigation.**
- Where a lawyer exercises legal knowledge, skill, judgment and industry to assemble a collection of relevant documents for litigation, privilege will attach.
- That is held to be the case even though the originals are not privileged. **The privilege arises from the selection process.**
- The majority do find that the privileged documents have not been sufficiently described and requires a further list.
- **The dissent** noted that then R. 1(5), current R. 1-3(1), requires matters to be determined on their merits, and only with full disclosure and limited privilege claims can that goal be fulfilled.
- The dissent also holds that if the original documents are not privileged, the copies ought not to be. The dissent concludes the defendant may indeed be taken by surprise.

### *Shaughnessy GCC v. Uniguard Services, (BCCA 1986)*

**Dominant purpose of document must be litigation to attract litigation privilege**

Case involved a fire which burned down the golf course club house after a security guard employed by one defendant allegedly had a party that resulted in the fire. The insurers for the parties had conduct of the litigation. The plaintiff claimed litigation privilege over a number of adjuster reports. The defendants applied for an order for disclosure of the reports arguing they were not privileged.

- The defendants argued that the reports had not been created for litigation as their dominant purpose, but rather were always prepared in the ordinary course of business whether litigation was contemplated or not.
- After cross-examination on affidavits, the court held some of the reports were made for the dominant purpose of litigation, and some were not.
- The court held the existence of suspicious circumstances is not enough to cover all reports with litigation privilege.

Court examined the true purpose of each individual report and applied the test to each document

### *Keefer Laundry v. Pellerin, (BCSC 2006)*

**Test for solicitor client privilege + litigation priviledge**

A party asserting that a document is privileged bears the onus of establishing the privilege. Solicitor-client privilege covers communications between lawyer and client.

- Litigation need not be contemplated, but not every communication is privileged.
- The test is: Is it a communication between lawyer and client; Does the communication entail seeking or giving legal advice; and Is the communication intended to be confidential [*i.e can't be released to third parties].*
- Here, the descriptions of the documents were not sufficient to make out a legal advice privilege.

- The court holds the preferable approach is to file affidavit evidence on an application to establish the privilege.
- Because there was conflicting case law, and the parties had not filed affidavits, the judge reviewed the documents.
- Litigation privilege is distinct from legal advice privilege and is narrower in scope.
  - Litigation privilege covers documents created for the dominant purpose of litigation, although the documents need not be confidential.
  - Litigation privilege applies to communications and documents between clients and third parties, the dominant purpose of which is litigation.
- **To establish litigation privilege a party must show:**
  - Litigation was ongoing or reasonably contemplated when the document was created; and
  - The **dominant purpose of the document was litigation,** based on an examination of all of the circumstances and the evidence filed in support of the claim of privilege.
- Again, affidavit evidence should be filed in support of the claim of privilege.
- Lawyer's brief privilege is intended to prevent a party from seeing the strategy of the other side.
  - This privilege allows a lawyer to make full investigation and properly prepare for litigation.
- **The test for lawyer's brief privilege** is whether the lawyer has exercised professional skill and judgment in assembling the documents.

### *Leung v. Hanna, (BCSC 1999)*

**The overriding requirement is not to reveal privileged documents**

Deals with the issue of listing privileged documents. There a privilege list included 8 of 10 documents described as having been initialed by the handling solicitor. The list didn't say what they were, who had created them where or when.

- The court held it is **necessary** under the current Rule **to list each document for privilege individually.**
- **At ISSUE:** Was the description of the documents sufficient?
- The court notes that then R. 26(2.1), current R. 7-1(7) limits the description required to that information which would not reveal privileged information.
- The court holds that providing the dates documents were made **may** disclose privileged information.
- Maintaining privilege is the right of the client and the responsibility of the lawyer.
- The court holds that the relief available to a party who believes privilege has been improperly claimed is to apply under then R. 26(12), current R. 7-1(20), for the court to review the document.
- Court holds it must **err on the side of maintaining privilege.**
- The court concludes that **the descriptions in the list do not assist the plaintiff**, **but the overriding requirement is not to reveal information that is privileged.**
- The plaintiff's application was dismissed but with the ability to bring an application under then R. 26(12) [court will review the description/document and if it decides that you have done it improperly then costs imposted] and costs assessed on the outcome of that hearing.

### *Hunt v. T&N, (BCCA 1995)*

**There is an implied undertaking of confidentiality of documents disclosed in litigation, for use beyond proceedings need leave of the court or the owner's position**

This action again involved asbestos litigation. The plaintiff's counsel wished to provide the defendant's documents to parties in the US for use in litigation there. The defendant would not provide copies of documents without the condition that they be used only for litigation in BC. The chambers judge was bound by the decision in ***Kyuquot*** which the court held permitted the plaintiff to make any use of the documents it wished.

- In ***Kyuquot*** the BCCA had held that while documents disclosed in litigation ought not to be used for other purposes, the party wishing to restrict use had to establish an injunction order was appropriate.[1]
- The BCCA sat a 5 judge panel and held the rule in ***Kyuquot*** was anomalous in Canada and other jurisdictions.
- Generally, there was a confidentiality obligation in respect of receiving documents in litigation.
- **The majority find there is an implied undertaking of confidentiality over documents disclosed in litigation**.
- The rule now is there is an obligation on a party obtaining discovery of documents requiring the party to obtain prior to using documents other than in the proceedings:
    - The owner's permission; or
    - Leave of the court;
- Use in the proceedings includes showing the documents to witnesses and advisors such as expert witnesses.
- The dissent in ***Kyoquot*** had held that a blanket confidentiality rule would encourage broader disclosure since there was less risk of misuse or collateral use of the documents disclosed for the purpose of litigation.
- The BCCA adopted that reasoning here.

## Discovery Procedures

Snapshot of procedures for ascertaining facts in addition to discovery:

**In each case, you should ask which discovery mode will ensure the most "just, speedy and inexpensive determination of the case on its merits", having regard to considerations of proportionality.**

| | XFD | Interrogatories | Pre-trial Exam | Physical Exam | Deposition |
|---|---|---|---|---|---|
| Rule | 7-2 | 7-3 | 7-5 | 7-6 | 7-8 |
| Type | Discovery | Discovery | Investigation | Discovey | Trial Evidence |
| Form | Oral, cross exam on oath | Written, with responses provided by affidavit | Oral cross examination on oath | Physical + oral | Oral direct examination subject to cross examination and re-examination |
| How? | As of right! | Requires consent or leave of the court **(R 7-3(1)** | Leave | Leave | Leave |
| Who? | Rule 7-2 (1)<br>1. Party of record<br>2. Adverse in interest | Any party of record or director, officer, partner, agent, or employee of party of record | Rule 7-5 (1) Uncooperative non party witness who may have material evidence relating to an issue | Person | Witness |
| Cases on pt | ***Kendall v. Sun Life Assurance Company of Canada, First Majestic Silver Corp. v. Davila, Rainbow Industrial v. C.N.R., Westcoast Transmission v. Interprovincial Steel, Allarco Broadcasting v. Duke, Fraser River Pile v. Can-Dive Services Ltd.,*** | **Roitman v Chan** | **Delgamuukw v BC; Sinclair v March** | ***Moll v. Parmar, Jones v. Donaghey,*** | ***Campbell v MCDougall*** |

[1] Trouble with that is that injunctions are difficult to get anyways, and getting an injunction in anticipation of someone doing

## Examination for Discovery

Examination for discovery has been described as "**beyond any doubt the greatest legal engine ever invented for the discovery of truth"** Courts prefer the process to be as free as interruption as possible [*Advocate* article]

Examination for discovery is an oral examination under oath of a party by another party adverse in interest (**R 7-2(1) and 7-2(4)**). Together with Document Discovery (**R 7-1**), one of the central means by which counsel **gather evidence for trial**. It can take place at any time, but generally is best to take place early in the proceedings.

- Generally, only parties of record are able to attend.
- An XFD takes place in private, typically in the boardroom of a law office, with only the parties and their counsel present: unlike a regular court proceeding, the general public has no right to be there. There is no judge.
- Examination is done before a court reporter who produces **a transcript**, in the form of questions and answers, which is available to the parties
- Subject to an implied obligation of confidentiality. Transcript cannot be used outside of the litigation.

**The Purpose of XFD in the context of the litigation:**

- To understand the other side's case, in order to know the case you will have to meet (discover facts, strengths and weaknesses)
- To tie down the other side and thereby **avoid surprises** at trial – result: you may eliminate or narrow issues
- To **assess the effectiveness** and believability of your own client and the other side
- To obtain **admissions of fact** which can be used as evidence at trial
- To facilitate **settlement**
-

**Use of examination for discovery**

1. Read-ins[2]: **Rule 12-5(46)** If otherwise admissible, the evidence given on an examination for discovery by a party or by a person examined under **Rule 7-2(5)-(10)** may be tendered in evidence at trial by any party adverse in interest unless the court otherwise orders, but the evidence is admissible against the following persons only:… [the adverse party]
   - As discovery is for the adverse party's benefit, it is best to coach clients to keep answers short, direct, and most honest.
   - Judge has discretion to order counsel to read-in context of any statement being read in.
   - In practice, judge will be given transcript of discovery and a list of expected questions
   - ***Browne v Dunn*****:** a cross-examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction
   - If a witness dies, their statements from XFD may be read-in
2. Preparation for cross-examination/Impeachment
3. Summary Trials (see **Rule 9-7(5)**)

**Time limits**

**Standard time limit**: **Rule 7-2(2)**): Unless the court otherwise orders, an XFD by any other party of record who is adverse in interest must not, in total exceed **7 hours** or any greater period to which the person to be examined consents.

**The following caveats should be kept in mind**:

**R 7-2(2)** governs "unless the court orders otherwise", meaning that on application, the court may compress or expand the default discovery rights. On an application to extend the time limit, the court must take into account the factors given in **R 7-2(3),** including:

(a) the conduct of the person who has been or is to be examined;
(b) any unreasonable denial or refusal to admit by the person who has been or is to be examined;
(c) the conduct of the examining party (for example, walking out, as in ***Kendall***);

[2] This is where counsel reads the selected portion to the Court

(d) whether or not it was reasonably practicable to complete the examinations within 7 hours; and
(e) the number of parties and XFDs and the proximity of interests of the parties.

In complex litigation, adverse parties may feel the need for more discovery time and might mutually agree **to consent** to additional examination. It is in rare circumstances that discovery will be able to resume after unilateral termination by Counsel, subject to intervention by opposing counsel which is of such a level that it frustrates the purpose of discovery (***Kendall***)

The time limit makes it important that courts enforce the principle that Counsel for **the examined party must not unduly interfere or intervene during the examination for discovery** (***Kendall***)

- Conversely, the time limit creates risk that Counsel for examinee will be inefficient by unduly objecting and interfering on the discovery to waste time.

***Campbell***: 11 hour discovery took place by consent, but there was a change in circumstances [change of medical status, return to work]. Court determined that a significant change, with reference to the principal of proportionality, here required an additional 2.5 hrs. Sub-factor that there were 2 cases, which could theoretically extend to 14 hours.

**Fast track time limit: Rule 15-1(11)** Unless the court otherwise orders, an XFD by all other parties of record who are adverse in interest must not, in total exceed **2 hours** or any greater period to which the person to be examined consents.

- This 2-hour limit is a total for all adverse parties with respect to any examinee. Therefore, if a P sues two Ds, those Ds must co-operate to share the 2 hours which they are collectively entitled to use to examine the P.
- As with R 7-2(2), R 15-1(11) is subject to variation by order of the court or by consent of the parties.
- Fast track litigation also comes with the additional requirement that XFD must be completed 14 days before the scheduled trial date**: Rule 15-1(12).**

**When should XFD take place? Anytime after pleadings are closed**. Really it is up to the parties when they would like to schedule it. It is usually a matter of strategy. There are no rules as to who goes first, but in practice the plaintiff would have the choice of examining the defendant first. Discovery can take place during trial, but counsel would need to provide a reason.

**Scope of Questioning:**

In XFD is in the nature of a cross-examination **(R 7-2(17); *Kendall v Sun Life*) Unless the court otherwise orders, a person being examined for discovery …. must answer any question within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action *(R 7-2(18))***

Scope of an examination for discovery is **very broad** (***Kendall v Sun Life***) - more so than Documents Discovery (recall the higher materiality threshold there). As long as it "relates to a matter in question", as defined by the pleadings, the examining party is absolutely free to elicit **hearsay.**

Scope of discovery is ultimately defined by the pleadings (***Allarco Broadcasting v Duke***), having in mind that pleadings and particulars may be amended (***Kendall v Sun Life;*** ).

There must be a nexus between the matter at hand and questions. For one fact to be relevant to another there must be a nexus (some kind of connection) between them.

If a witness says something during Examination, they still retain a right to object to their own comment later at trial Counsel can re-examine their own witness after they have been cross-examined

**What is the witness is unable to answer certain questions?**

The duty to inform oneself: **Rule 7-2(22)-(24)**

- A witness being examined for discovery must answer relevant, non-privileged, questions within his knowledge or means of knowledge: **Rule 7-2(19)(a).**
- The means of knowledge requirement places the witness under a duty to inform himself which is further codified in **Rule 7-2(22).** So lack of personal knowledge is not grounds for an objection!
- Although, the examination for discovery may be adjourned so that the witness may inform himself and the witness may provide his responses by letter**: Rule 7-2(23).**

- Responses by letter are deemed to be given under oath during the XFD, meaning they can be used at trial in the same way as the XFD transcript. Once the examining party gets the response letter, he may opt to continue the XFD: **Rule 7-2(24)(b),** subject to the time limit given in subrule (2).

**Objections at XFD –**

**R 7-2(25)** *"If a person under examination objects to answering a question put to him or her, the question and the objection must be taken down by the official reporter and the court may (a) decide the validity of the objection, and (b) order the person to submit to further examination and set a maximum duration for that further examination."*
The following are among the valid bases for objections: **privilege**—see Rule 7-2(18)(a); **irrelevance**—see ***Kendall v Sun Life Assurance Co of Canada and Allarco Broadcasting v Duke;*** **ambiguity** (but it had better be real ambiguity); **unfair** or incorrect summary of the evidence; asking for the **subjective view of the examinee** (except where it is relevant); soliciting an "**expert" opinion from an unqualified person**; **speculative** or hypothetical question; asking the witness' **opinion on a conclusion of law**, even if he is a lawyer: Allarco Broadcasting v Duke; question contains embedded assumptions ("where did you spend the money you stole from my client?")

**Further authority in *Kendall* regarding objections at XFD:**
The legal authorities emphasize the proposition that an XFD is a cross-examination, and counsel for the examinee **must not unduly interfere** or interrupt the examination.

- Unless it is very clear that answers may not be relevant→**better course is to allow the question**
- Do not interfere unless necessary to resolve ambiguity in the question or to prevent injustice.
- Proper conduct of a discovery relies on the professionalism of Counsel.
- Be careful as to the form of your objections
- Asking witness to give their subjective view/opinion on a topic → usually not relevant. The question should be something in the knowledge of the witness
- Counsel should be beware of vague questions – "*what was the condition of your health*" → when??
- Hypothetical questions that call for speculation → Not relevant b/c did not happen! Counsel should keep q's to what is at hand
- Counsel using terms that may be legal i.e. "Was he *enriched*?" → this can cause confusion b/c unclear if you are using colloquial or legal sense of the word.

**The following are never valid objections by counsel:**

- **Confusing question**. The witness, not counsel, can say whether he is confused by the question.
- "**Asked and answered**". If the examining party wants to waste 7 hours getting the witness to repeat himself, he is entitled to do so and can only cause himself prejudice that way. If he runs out of time, the court is unlikely to look favourably on an application to extend when presented with a transcript replete with unreasonably repetitious questions!

**WHO MAY BE EXAMINED**

- Each party of record to an action must make himself or herself available for XFD by the parties of record to the action who are adverse in interest (**Rule 7-2(1))**
- Two requirements: (i) party of record; and (ii) adversity of interest.
- Limitations? See ***First Majestic*** and **Rule 5-3(g)**
- Adversity of interest is determined **with respect to the pleadings.**
  - Most obvious adversity of interest is that commonly arising between a P and a D (although one can imagine scenarios in which there would be no adversity of interest between a particular P and a particular D in a multi-party lawsuit).
  - There may also be adversity of interest between two parties with the same litigation "label". For example, if the pleadings disclose an issue which, if decided one way, would benefit D1 to the detriment of D2 and, if decided the other way, would benefit D2 to the detriment of D1, then defendants D1 and D2 are adverse in interest. so Counsel may plead this and examine them

**EXAMINING A PARTY THAT IS NOT AN INDIVIDUAL**

- The scenario we are concerned with in this course is **R 7-2(5)**: examination of a party who is not an individual. This includes corporations and presumably partnerships as well.
- Subject to the case law in the table below, the basic framework for examining a representative of a corporate D under Rule 7-2(5) is:
  **(a)** the examining party is entitled to examine precisely one representative of the corporate party as of right - **R 7-2(5)(a)** ***but, see *Westcoast***
  **(b)** the corporate party is required to nominate a representative who is knowledgeable about the issues in the litigation **- R 7-2(5)(b)**
- **(c)** the examining party retains a right to pick either the nominated representative or anyone else who either is presently, or has been in the past, a director, officer, employee, agent, or external auditor of the corporate party - **R 7-2(5)(c)** ***but see *Rainbow Industrial.***

Despite the framework given above, the entire subrule is subject to discretion: ***"unless the court otherwise orders".*** In the cases, this discretionary space has led to two kinds of issues:

1. The D tries to block the P from picking the representative of the P's choice under (c).
   This was the issue in the ***First Majestic*** and ***Rainbow Caterers*** cases.
2. The P tries to examine an additional representative beyond the one it is entitled to under (a). This was the issue in the ***Westcoast*** case.

***Kendall v. Sun Life Assurance Company of Canada, 2010 BCSC 1556***

**An examination for discovery is a cross-examination, and counsel for the examinee must not unduly interfere or interrupt the examination**

*D objected to a number of questions on the basis that they related to a legal issue or were argumentative. P applied for a witness to be recalled for an opportunity to answer questions. Court considered purpose of XFD, relation of time limit to purpose and procedure of XE and application for time limit to be extended*

**Held**: Given the extent of the interruptions by Counsel for the D, witness was unresponsive to questions and ability to conduct the XFD was defeated. It was appropriate to start discovery afresh.

- Allowing wide-ranging XE on XFD is far more cost-effective

Counsel for the examinee should raise objections to admissibility of evidence at trial rather than on XFD

Only in rare cases will a court endorse request to continue XFD by party who unilaterally ended it. In this case, P's right of cross-examination was thwarted by the D's constant objections. Applying principles from Rules 7-2(3) and 7-2(25), P should be able to begin discovery afresh.

***First Majestic Silver Corp. v. Davila, 2011 BCSC 364***

**Multiple Ps do not have multiple rights of discovery, especially where there is a common interest**

Multiple plaintiffs—at least where they have a common interest—must all examine the same representative of a corporate defendant. The new P must examine the representative who was already XFD'd by the existing Ps. This may impose a practical limit on the amount of time the new P will discover the D: because it is limited to the representative already chosen by the existing Ps, there would seem to be little to gain by rehashing the existing Ps' XFD of the representative

***Rainbow Industrial v. C.N.R., (BCSC 1986)***

**Examiner has the right of choice in first instance. But, the rule is relaxed to balance the interests SO THAT JUSTICE CAN BE ACHIEVED as far as that is possible.**

The court may substitute the corporate D's choice as a representative to XFD for the P's choice if this is necessary to achieve justice and fairness. Here, Court found there would be prejudice to the D if the more junior, less knowledgeable representative was examined, while no prejudice to the P of substituting the new one.

***Westcoast Transmission v. Interprovincial Steel, (BCSC 1984)***

**Test for further XFD**

On an application for the examination of a second representative, the test for whether an XFD has been satisfactory is

objective, not subjective. Has there been a full questioning on all matters which may be relevant to the issues raised on the pleadings, and have the questions been answered either of the witness' own knowledge or upon his informing himself? To show that an XFD is unsatisfactory, questions must have been either not answered or given incomplete, unresponsive, or ambiguous answers
If witness is responding with hearsay (as happened in this case) that will not be helpful at trial and not sufficient as a response. Held – application dismissed.

***Allarco Broadcasting v. Duke, (BCSC 1981)***
**XFD enhances litigation by removing surprise, defining & clarifying issues, simplifying proof of many matters. Scope of discovery is governed by the issues raised in the pleadings at the time the discoveries are held**.
Not to be in the nature of a fishing expedition. Amendment of pleadings doesn't allow renewed XFD. When questioning, not required to attack the fortress in a frontal assault- may disguise the purpose
Overly-sensitive objections may be irresponsible and professionally improper.

***Fraser River Pile v. Can-Dive Services Ltd., (BCSC 1992)***
**Important to prohibit counsel from telling his W what he or she should say. However, when discoveries are long, it may be impractical to prohibit counsel from having any discussions with his or her witness or to limit the discussion to issues not related to the evidence given or to be given.**
Witness gave a bad answer, and Counsel requested an adjournment to discuss this with his witness.
**Where XFD will last no longer than a day**, counsel should refrain any discussion with the witness. They should not even be seen to converse during any recess. (Prof: Don't go for lunch together, don't do anything!)
**Where XFD is scheduled for more than one day**, counsel is permitted to discuss all issues relating to the case, including evidence given or to be given, at the end of the day. However, before this discussion takes place, counsel must advise the other side of his intention to do so.
Counsel should **not seek an adjournment** during the examination to discuss evidence that was given by the witness. Such discussions should wait until the **end-of-day adjournment** or until **just before re-examination** at the conclusion of the cross-examination.
**PRINCIPLE:** The rules above reflect the ethical issue of communication btw counsel and the party being examined
**What if a party does not show up at XFD?** This is serious (the other side can apply to strike your case, but this is rare - more commonly there will be a rescheduling of the XFD, or compelling the witness to show up somehow)

## Interrogatories
*What:* a form of written discovery; answers provided by **affidavit.** A party seeking information can serve written questions on another party which the party so served is obliged to answer
*When available:* not available as of right; requires consent or leave of the court **(R 7-3(1); must answer wi 21 days!**
*Purpose:* The purpose of interrogatories is to enable the party serving them to obtain admissions of fact to establish his case, and to provide a foundation upon which cross-examination can proceed when examinations for discovery are held: ***Roitman v Chan***.
Per ***Roitman:*** ***[11]*** *"An important general principle governing the propriety of interrogatories should be the* ***practicality of the procedure****…the law should encourage the selection of the tool which is likely to achieve the best result for the least effort and cost"* ***[12]*** *Generally speaking, issues involving* ***extensive research****, such as* ***precise chronologies*** *or* ***exhaustive lists****, would seem to be more appropriate for the more expansive time-frame permitted by interrogatories than for a more confrontational, time-pressured examination for discovery. Conversely, questions requiring a narrative answer are much more likely to remain in focus at an examination for discovery, where counsel can expand on and limit the witness' questions as appropriate."*

In each case, you should ask which discovery mode will ensure the most "just, speedy and inexpensive determination of the case on its merits", having regard to considerations of proportionality. Interrogatories are useful for preparing for an XFD. The actual XFD itself is the best place to get the narrative of the story.

**Who may be sent to Interrogatories?**
Unlike examinations for discovery, which are clearly only available against adverse parties or their representatives, interrogatories seem to be available against any party of record, or director, officer, partner, agent, employee or

| √ Principles of Interrogatories | ☒ What an Interrogatory Isn't |
|---|---|
| • Interrogatories must be **relevant** to a matter in issue in the action<br>• Interrogatories are **narrower in scope** that examination for discovery<br>• The **purpose** of interrogatories is to enable a party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon which examinations for discovery are held. Usually you still end up doing an XFD<br>• The court may permit the party interrogated to defer its response until other discovery processes have been completed, including XFD | • Interrogatories are not to be in the nature of a **cross-examination**<br>• Interrogatories should not include a demand for **discovery of documents** (that is part of Documents Discovery)<br>• Interrogatories should not duplicate **Particulars** (the point of Interrogatories is to obtain facts, not particulars)<br>• Interrogatories should not be used to obtain the names of witnesses<br>- Except where the identity of the witness is a material fact i.e. because the witness played an active role, as was alleged in ***Roitman***. |

external auditor of the party: Rule 7-3(1).3 This is, however, subject to the overriding requirements of leave or consent.

### *Roitman v. Chan, (BCSC 1994)*

**An important general principle governing interrogatories is the practicality of the procedure. The law should encourage the procedure which is likely to achieve the best result for the least effort and cost.**

*Mr Roitman was badly injured in a car crash. He was taken to St Paul's Hospital in Vancouver for surgery. The next day, he had a heart attack and died. Plaintiff is Mr Roitman's wife, Mrs Roitman, who alleges that various medical defendants failed to recognize that Mr Roitman was at risk of heart complications associated with the surgery. Plaintiff's counsel sent the following questions by way of interrogatory† to the medical defendants:*

1. "Describe in full and complete detail your involvement in the medical care and treatment of . . . Mr Roitman from March 28, 1992 until April 16, 1992."
2. "Describe in full and complete detail your knowledge of the involvement of other persons in the medical care and treatment of Mr Roitman from March 28, 1992 to April 16, 1992. That is, who provided medical care and treatment to Mr Roitman and what did they do. [sic ]"

**Issue Should plaintiffs' interrogatories be struck out?**

Analysis · Question 1 should not be answered.

- It is not designed to obtain an admission of fact.
- It offends the purpose of interrogatories, which is to obtain admissions of fact in order to establish
- one's case and to provide a foundation on which to cross-examine in XFD.
- It is more conveniently dealt with as a narrative at XFD.

Question 2 should be answered.

- It is more convenient to have the chronology sorted out before XFD.
- It does not offend the rule against using interrogatories to obtain witness names because it falls under
- the exception which requires naming of witnesses whose identity is related to a material fact.

## Pre-Trial Examination of NON-PARTY Witnesses

The final procedure for **ascertaining facts** in Part 7 of the Rules is "**Pre-Trial Examination of Witnesses**" under **Rule 7-5**. The title of the rule is something of a **misnomer** since in the first place there is no hard requirement that the examination take place before trial (see ***Delgamuukw No. 1***), and in the second place only a subset of witnesses is permitted to be examined under the rule, **namely non-party witnesses**. A better title for the rule would be ***"Examination of Non-Party Witnesses".***

Examination of non-party witnesses under **Rule 7-5** is not in aid of discovery. It is a **cross-examination** of an **uncooperative non-party witness**, on oath, for **purely informational** purposes. The witness may only be examined with leave of the court.

***What:*** oral examination on oath of **non-party** witness. Length max 3 hrs.

***Purpose:*** purely informational; to permit examination of an uncooperative witness, not to record evidence or provide admissions. Idea that good citizens should participate in the pursuit of justice

***Test:*** **where a person has material evidence but (i) has (A) refused or (B) neglected to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question; or (ii) has given conflicting evidence.**

***Use at trial:*** solely to **impeach** the witness. Not available for read-ins

- **Impeach** = when you put to a witness evidence that they have given before, which contradicts evidence they have just given on the stand

***Scope:*** same as XFD (but up to 3hrs long); may extend to matters of opinion in appropriate cases. Specifically, not limited to pleadings. Can require witness bring all documents relevant to the matter in question.

***CAREFUL*** – students can sometimes confuse Pre-Trial Examinations of Witnesses and XFD. **XFD exclusively involve parties and Pre-trial Examinations involve non-party witnesses**

### *Delgamuukw v. B.C., (BCSC 1988)*

**Must disclose the underlying facts known to her upon which her report is based, for without that info, the D would not be able to use the rule for the information gathering purposes for which it is intended.**

Application by the D province for an expert genealogist retained by the Ps to be examined under oath

**AT s:** Had there been a refusal by this expert to provide answers? She had only provided answers to some of the questions posed earlier

**HELD:** Application allowed. Ms Harris has material evidence relating to the Gitksan genealogy. The Defendants are unable to obtain facts and opinions by other means and Ms. Harris has failed to provide a responsive statement by providing answers to parts of 29 of 110 questions posed. Court ordered her expert to attend for examination.

### *Sinclair v. March, (BCSC 2001)*

**The scope of inquiry is not limited to the issues between the parties as defined in the pleadings, but includes all that is generally relevant between the parties.**

Application by P for pre-trial examination in medical negligence case of physician who provided post-operative care, both as to complications dealt with by the physician but also as to the physician's opinion about the surgery which was the subject matter of the action

**HELD:** application allowed to the extent the physician could respond to questions posed without new research. While Dr Christensen is an expert, he is not retained by either of the parties. He has unique and irreplaceable knowledge and is required to submit to examination by the plaintiff. Plaintiff is entitled to know the facts and opinions formed by the physician during his treatment of her. Reasonable compensation to be paid.

## Depositions

It sometimes occurs that a witness with material evidence is unwilling or unable—or in any event will be unable by the time the trial finally rolls around—to testify in person. When this happens, it may be necessary or convenient to take the witness' evidence by deposition under **Rule 7-8**. A deposition is a form of **pre-recorded sworn evidence**. A witness may only be deposed by **consent** of the parties or with **leave of the court**.

A deposition can be recorded by question and answer, although nowadays it is more common to video record. The examining party conducts a direct examination and the witness is subject to cross-examination, presumably by the adverse parties. The recording of the evidence is then adduced into evidence **in its entirety** at trial.

**Rule 7-8(1)** – *"By consent of the parties of record or by order of the court, a person may be examined on oath before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial."*

*What:* oral examination on oath. Essentially a time-lapse → you take evidence before trial, and then put it into play at trial.
*Purpose:* to take sworn evidence in order that the deposition is available to be tendered as evidence at trial.
*When:* before or during trial.
*Where available:* by consent or by court order
*Test:* Evidence must be **directly material**, and not just corroborative of other evidence
*Factors for consideration:* **R 7-8(3)**

- the convenience of the person sought to be examined
- the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence
- the possibility that the person will be beyond the jurisdiction of the court at the time of the trial
- the expense of bringing the person to the trial
- the possibility and desirability of having the person testify at trial by video conferencing or other electronic means.

**Should the Court grant Leave for a Deposition?**
Real time evidence is preferred to deposition for a number of reasons. Partly this has to do with the court's ability to assess the credibility of the witness. But it also has to do with the quality of the evidence given by the witness. Depositions take away the court's ability to control the conduct of examinations by ruling on objections in real time. Furthermore, depositions prevent counsel from adjusting their examination of the witness in response to rulings on objections and in response to other evidence coming to light during the course of the trial. Thus where possible, the court will nearly always prefer evidence given in real time to recorded depositions. Where live testimony by way of **videoconference** is available, **Prof says that the court will almost always prefer live video evidence to deposition.**

***Campbell v. McDougall, 2011 BCSC 1242***
**Court demonstrated preference for testimony via videoconference real time as opposed to deposition**
*Dr Maloon must testify by videoconference rather than being deposed. The deciding factor is (d): the **possibility** of Dr Maloon testifying by videoconferencing.*
Application by the D that evidence of D's expert witness (Malone) be provided by deposition before expert witness left for Africa for 6-month sabbatica
**HELD:** Application dismissed. Although convenience was on the side of the Defence and it was clear that the witness would be absent at the time of trial and beyond the jurisdiction, the interests of justice required attendance by video-conference over deposition. The court wanted to hear the evidence live.
**REASONS**: After citing from ***Byers v. Mills***, the court was influenced by the importance of the witness, the likely scope of cross-examination, the possibility for objections and the prejudice to the Plaintiff in having to conduct the deposition before the commencement of trial. The court also considered the witnesses' knowledge of his potential absence at the time the report was provided.

## Admissions

The admission of a party is presumptively admissible in evidence against that party. **Rule 7-7** provides some rules on admissions from different sources and some guidance on situations in which admissions are permitted to be withdrawn.

Importance: Admissions allow you to narrow and define the issues; serve as the basis for an order dismissing the claim or granting judgment

How made: Can be made in various ways:

- in response to a **Notice to Admit** – admissions either made or deemed to have been made
- in pleadings, petition, response to petition
- by way of affidavit (either responding to an Interrogatory or otherwise)
- in a letter under **Rule 7-2(23),** or
- upon examination for discovery.

Effect: to bind the party for purposes of the action

**Scope of Rule 7-7:** Sets out procedures for Notices to Admit, including consequences of failure to respond
Governs withdrawal of certain forms of admissions
Covers three main types of admission:

1. those requested in a notice to admit and either made or deemed to have been made;
2. those made in a pleading (***Hurn v McLennan***), petition, or response to petition; and
3. those made by a party in an affidavit or on examination for discovery.

**Notice to Admit:** This is not strictly a Discovery device, but provides a procedure for requesting admissions of fact. **Rule 7-7(1) -** any party of record to an **action** in which a response to civil claim has been filed may serve a **Notice to Admit** on any other party of record (usually sent before trial). A notice to admit requests that the party served admit the truth of a fact or the authenticity of a document for the purposes of the action only. The party served with the notice of admit has **14 days** to respond with an admission, a denial, or a refusal to admit with accompanying reasons.
Purpose: to narrow issues and dispense with proof
When available: only in an action; only once pleadings have been exchanged
In default of a response within the 14 day limit, the party served is **deemed to have admitted** the truth of the fact or authenticity of the document specified in the notice to admit: **Rule 7-7(2**).
If the party served unreasonably refuses to admit the fact or authenticity, may be costs consequences: **Rule 7-7(4).**

**To avoid a deemed admission:**

- Must respond to NTA within 14 days by delivery of a written statement
- Must specifically deny
- Must provide explanation of why the admission cannot be made
- Identify where a refusal to admit is made on the grounds of privilege or irrelevancy or that the request is otherwise improper

**Admissions which are more difficult to withdraw:**
Certain admissions can only be withdrawn by consent or with leave of the court : **R 7-7(5)**
The following types of admissions require leave of the court: (a) admissions made in response to a Notice to Admit; (b) deemed admissions; and (c) admissions in pleadings, petitions, or responses to petition.
*Notice that this list does not include admissions made in affidavits or on Examination for Discovery.

**Test for Leave to Withdraw under Rule 7-7(5)**
**The test for leave to withdraw these types of admissions is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact** (***Hurn v McLennan***)

In the two cases we studied, the presiding Masters applied the above test based on the following factors:

| Factor | *Hurn v McLellan* (p 137) | *Piso v Thompson* (p 149) |
|---|---|---|
| • whether the admission was made inadvertently, hastily or without knowledge; | × | ✓ |
| • whether the admission is counsel's fault, not the party's fault; | × | ✓ |
| • whether the fact admitted was not within the knowledge of the party admitting it; | ? | ? |
| • whether the fact admitted is not true; | ? | ? |
| • whether the admission can be withdrawn without prejudicing a party; | × | ? |
| • whether the admission can be withdrawn without causing loss of a trial date; and | × | × |
| • whether the application to withdraw was made without delay (presumably, measured from when the applicant becomes aware of the need to withdraw it). | × | ✓ |
| • whether withdrawal will further the objective of proportionality | ? | ✓ |
| **OUTCOME** | × | ✓ |

### *Hurn v. McLellan, 2011 BCSC 447*

**The governing test is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.**

*Application by the D to amend its pleadings so as to withdraw an admission of liability in a motor vehicle case. tHis engaged **R 7-7(5)** which requires leave of the court to withdraw certain amendments, including admissions made in a pleading.*

**HELD:** Application denied. A withdrawal of the admission of liability would result in prejudice to the P, not only in a delay to the trial but because the litigation has been conducted on the basis of an admission for more than a year. Thus the important factor here was delay. The P's ability to conduct any investigation of liability was hampered by the passage of time. Also, the admission was made after a thorough investigation and there has been delay in bringing the application.

### *Piso v. Thomas, 2010 BCSC 1746*

**Rule 7-7 does not create a trap or add an inescapable obstacle to ensnare or trip up sloppy or inattentive counsel to the detriment of the parties to the litigation.**

Application by the Plaintiff to withdraw deemed admissions resulting from his Counsel's failure to respond to a Notice to Admit. Scope of the Notice to Admit was extensive.

**HELD**: Application granted. It was essentially conceded that admissions resulted from inadvertence and the application to withdraw was brought on a timely basis in circumstances where there was an issue to be tried.

From para. 24: *"The refusal of leave to withdraw these admissions will deny the Plaintiff his opportunity to have his claim heard on the merits. The argument that the plaintiff can have his relief by way of a professional negligence claim against his former counsel fails to recognize the further delay and expense of such a claim. In the context of proportionality such an option does not seem appropriate from a financial or court resource perspective"*

## Physical Examinations

Physical examination of a witness whose **physical or mental condition** is in issue is governed by **Rule 7-6**.

Per **Rule 7-6 (1)**: If the physical or mental condition of a person is ***in issue***, the court may order an examination by a medical practitioner or other qualified person.

The rules don't specifically call this procedure a form of "discovery" but, because a witness who needs to be physically examined will typically be a party to the action, it will **typically function similarly to discovery rights**. Physical examinations are most likely to arise in the context of personal injury cases.

*Purpose:* provides for physical examination of a person by way of a medical exam or inspection of property to ensure that all litigants obtain access to all relevant evidence

*When available:*

- Medical exam: only where the physical or mental condition of a person is an issue in an action – see ***Jones***, p. 387
- In both cases: ***not*** available as of right; court's discretion to be exercised judicially having regard to the respective interests of the parties and the circumstances of the case

### *Moll v. Parmar, 2012 BCSC 1835*

Car accident – P alleged various physical injuries. Appeal from a Master's order granting two further medical **IMEs** ("Independent Medical Examination").
Rule 30(1) (old rule, now it is **R 7-6)** provides **discretion** to the court to order an IME and under **Rule 30(2)** more than one IME may be ordered.
An IME is granted to ensure a **reasonable equality** between the parties in the preparation of a case for trial.
Civil Rules state that the expert's duty is to assist the court and NOT be an advocate for one of the parties. **Expert must be impartial and objective.**
**Rule 30(2)** is **discretionary**. The discretion must be exercised judicially.

- Before a second IME will be allowed, there must be some question or matter that could not be dealt with at an earlier examination. (Not available simply to bolster an earlier opinion of another expert).
- Subsequent IME's should be reserved for cases involving **exceptional circumstances (a higher standard)**

**ANALYSIS:** Court allowed the appeal in respect of one of the examinations, and dismissed the appeal in respect of the other. One of the doctors seemed to be recruited as an "advocate" for the Defence, therefore biased and compromising reasonable equality btw the parties, while the other doctor was more independent.

### *Jones v. Donaghey, 2011 BCCA 6*

**The phrase in issue means an ultimate fact that has to be proved to make out the cause of action; would in and of itself have legal consequences for the parties..**
An alternative Infant plaintiff sued the Director of Child Development alleging he was harmed by his foster mother, Ms Donaghey. The claim was in negligence and was essentially that the Director breached his duty of care to the plaintiff by leaving him with Ms Donaghey when the Director knew or ought to have known that she was prone to violence. Plaintiff argued that whether Ms Donaghey had a personality disorder or not was relevant to whether she was prone to violence, putting her mental condition in issue and entitling plaintiff to have a psychiatrist examine her.
Issue Is Ms Donaghey's mental condition in issue within the meaning of **Rule 7-6 (1)?**
Example of a time when a person's mental condition is in issue . Suppose in a negligence action for personal injury the plaintiff claims that the harm caused by the defendant made the plaintiff crazy. In this case, the plaintiff's mental condition is the compensable damage! Since damage is part of the cause of action, whether the plaintiff is crazy or not is an ultimate fact. But in this case, whether Ms Donaghey has a personality disorder or not is not an ultimate fact . It can neither make out the plaintiff's cause of action nor have legal consequences in and of itself. At best, it is an intermediate fact relevant to proving that Ms Donaghey is prone to violence.
Held Ms Donaghey's mental condition is not in issue and therefore plaintiff's application is denied.

# Chambers Practice

## Chambers

**Chambers proceedings** are matters that are proceeding in **BCSC**; in a **courtroom**; [*note that some matters can proceed by desk order; or written submissions*]; before a **judge** or **master**; **other than a trial.**

**Applications in Chambers**

**R 8-1**: dealt with in chambers, subject to limited exceptions can be **final in nature [**disposes of all or part of the claims or defences in the action]; or **Interlocutory.** Interlocutory applications are of three types:

- Compliance or non-compliance with the rules (ie- **seeking compliance with doc discovery rules**)
- Seeking leave from the court to take a procedural step (ie- **withdrawing admissions**)
- Raising issues of legal substance on an interim basis (ie- **seeking an interlocutory injunction**)

**Rule 22-1**—governs all Chambers proceedings
Chambers proceedings include:
(a) Petition proceedings [Test for whether to convert a petition into an action appears in ***South Paw***]
(c) All applications (including for summary judgment/trial, case management conferences and trial management conferences)
(d) Appeals from, apps to confirm, change or set aside a master's order, report, certificate, or recommendation
(e) action ordered to proceed by affidavit or on docs before the court, and stated cases, special cases, and hearings on point of law

Evidence on an application is by **AFFIDAVIT**: Rule 22-1(4), but the Court

(a) **may order cross-examination on affidavits** [*not restricted to substance of the affidavit*],
(b) examination of a party or witness, directions required for the discovery, inspection or production of a document, order an inquiry, assessment or accounting,
(c) and receive other forms of evidence and other forms of evidence [the most common form of other forms of evidence the sworn statements of counsel; ***MTU*** case-can accept unsworn statements of counsel, but they shouldn't be relied upon to establish new facts not within the personal knowledge of counsel, or facts which are not of singular importance to the to the outcome

**Cross-examination on affidavits:**
The court *may* order that a deponent of an affidavit attend for cross-examination, either: i) **before the court** or, ii) as is more usual, before **some other person**, such as a court reporter. Before the Court is invoked more often when there is an issue of credibility, and the latter option will be conducted in the office of a law firm.
On an application to cross-examine on an affidavit, the Court will consider:

- whether there are **material facts in issue**;
- whether the cross-examination is **relevant to an issue that may affect the outcome of the substantive application**; or
- whether the cross examination will **serve a useful purpose** in terms of eliciting evidence that would assist in determining the issue:

The scope of cross examination on an affidavit is narrower than in examinations for discovery and pre-trial examination of witness; deponent can only be cross examined on matters she has sworn to and matters relevant to the application

**Practice Note**: Cross examination is usually ordered wrt to application for final order; don't generally get cross-examined wrt interlocutory orders. Also don't generally want to be in a position where you as counsel are giving substantive evidence to the court; more preferably to ensure that the affidavit's are complete

**What powers does the Court have in Chambers?**

The powers of a court on a hearing of a chambers proceeding are set out in Rule **22-1(7)**

- On an application in chambers, the court may
  - Grant or refuse relief
  - Dispose of any question arising on the chambers proceeding (see *Bache Hasley v. Charles*)
  - Adjourn the application
  - Obtain the assistance of one or more experts;
  - Order a trial, generally or on an issue (see South Paw) (R. 22-1(7)(d))

[Note that in the context of these powers, the Court can order cross-exam on affidavits, which can be used to allow the Court to assess credibility, or achieve a full grasp of the evidence without ordering a full trial.

***MTU Maintenance Canada Ltd. v. Kuehne & Nagel International Ltd., 2007 BCCA 552***

**There is discretion for court to accept unsworn statements of counsel as other evidence in some circumstances; they should not be relied upon to establish new facts not wi the personal knowledge of counsel, or facts which are of singular importance to the outcome of the application. The facts they attempt to establish must be within the personal knowledge of counsel**

*Appeal from decision of Chamber's judge holding that the BCSC has the jurisdiction to hear the claim of the respondent, MTU, the plaintiff, against the appellant, a Minnesota company. Chambers judge held that the plaintiff had pleaded sufficient jurisdictional facts to give rise to the presumption pursuant to s.10 of the Court Jurisdiction and Proceedings Transfer Act, that there is a real and substantial connection btw the US defendant and the cause of action and that the presumption had no been rebutted.* Appeal from the decision of a judge in chambers relying on *unsworn statements by counsel* as to where the plaintiff carries on business to determine issue of jurisdiction.

HELD: Court held **there is discretion for court to accept unsworn statements of counsel as other evidence in some circumstances**; they should not be relied upon to establish new facts not wi the personal knowledge of counsel, or facts which are of singular importance to the outcome of the application. The facts they attempt to establish must be within the personal knowledge of counsel, i.e not hearsay

**Practice Note**: Ensure your affidavits cover off principal facts on which you are going to rely upon in your statements.

***Southpaw Credit v. Asian Coast Development (Canada) Ltd., 2012 BCSC 14***

The test to be applied for conversion of a petition to an action is **whether there are *bona fide* triable issues between the parties that cannot be resolved on a summary basis, i.e on the documentary evidence**.

Application by the petitioners to convert oppression petition into an action [*recalling that petitions can be converted into a trial*], to be heard at the same time as a second claim to be commenced

HELD: application dismissed:

Court notes that the mere existence of a triable issue will not be enough to warrant conversion to the trial list; if lesser measures will suffice, ex; cross exam on affidavits→ so also **ask would lesser measures suffice? [especially in light of practical considerations such as costs and timeliness]**

**Para 27**: factors to consider include:

(a) the undesirability of **multiple proceedings**;

(b) the desirability of avoiding **unnecessary costs and delay**;

(c) whether **credibility** is at issue [**Strategy:** *usually the basis for whether the court will determine if it is appropriate to convert something; even if there are credibility issues it can be resolved through affidavits*] *and documents*;

(d) the need to have a full grasp of all the evidence and

e) whether it is in the interests of justice that there be pleadings and discovery in the usual way in order to resolve the dispute.

*[Note these considerations overlap with those for summary trial*]

## Masters

Masters are judicial creatures of statute. The jurisdiction of a master is set by the ***Supreme Court Act*, s. 11(7).**
A master has, per section 11 (7) subject to the limitations of section 96 of the **Constitution Act, 1867,** the same jurisdiction under any enactment or the Rules of Court as a judge **in chambers** unless, in respect of any matter, the Chief Justice has given a direction that a master is not to exercise that jurisdiction.

So the two principal limits on the jurisdiction of a Master are: 1) **have same jurisdiction as a judge in Chambers** (*can't run trials*) and 2) **whatever the CJ directs is outside of their jurisdiction.** And, per **Rule 23-6:** Without limiting any other powers of a master under these SCCR, a master hearing an application has the powers of the court set out in **Rules 8-5(6) to (8)** and **22-1(2)** to **(8)**

**The General Rule is that findings of contested fact or disputed law is outside the Master's jurisdiction; if the point requires weighing evidence to make a determination, matter is probably not within the Master's jurisdiction**

PER PD #34 [see PD #42] for full listing

| Order a master is **NOT** permitted to make | Order a master **CAN** make, subject to constitutional limitations [set out in ***Pye v Pye***] |
|---|---|
| • Grant relief where power to do so is expressly<br>• Conferred on a judge by a statute or rule.<br>• Dispose of an **appeal** or application in the nature of an appeal on the merits.<br>• Approve settlements and grant judgment by consent<br>• when one of the parties is under a legal disability<br>• **Grant injunctions** except for interim relief in certain<br>• enumerated family law matters.<br>• Set aside, amend, or vary the order of a judge other than:<br>a. to change a time limit prescribed by an order provided that the original order was one a master has the jurisdiction to make; and<br>b. to vary interim orders which a master has the constitutional jurisdiction to make.<br>c. To grant a stay of proceedings where there is an arbitration | • Interlocutory applications under the Rules<br>• Certain interim orders in family law cases.<br>• Final orders by consent, except where one of the<br>• parties is under a legal disability as described in ¶ 2(c).<br>• Final orders **under Rule 22-7** .<br>• Final orders for Summary Judgment under **Rule 9-6**<br>• where there is no triable issue.<br>• Final orders Striking Pleadings under **Rule 9-5 (1)**<br>• provided that there is no determination of a question of law relating to issues in the action. [*this is where the distinction as to whether or not the Master has jurisdiction can get a little arcane*]<br>• Final orders granting Default Judgment |

***Pye v Pye***

**Masters may not determine contested disputes or decide appeals by weighing evidence. They do have jurisdiction to make final consent orders, and other final orders subject to constitutional limitations and the restrictions imposed by practice directive.**

Appeal from an order considering whether a master has the jurisdiction to make final orders. The order at issue was made, by consent at a judicial case conference as to the status of certain property as a family asset.

**HELD:** the order was within the jurisdiction of the master; **masters have the jurisdiction to grant final orders, subject to constitutional limitations and the restrictions imposed by practice directive**.

The constitutional limit of the rule is that masters may not:

- Weigh evidence
- Decide appeals
- Decide contested issues of fact or law

## Affidavits

An affidavit is a written statement of evidence, sworn by the person giving the evidence (the deponent) before a person authorised to take affidavits. A court relies on affidavit evidence in the same way as it relies on oral testimony.

**Affidavits are the principle form of evidence in chambers proceedings**

**In the context of counsel as deponent,** the Code of Professional Conduct provides:
S. 4.02 (1): A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal; the matter is purely formal or uncontroverted; or it is necessary in the interests of justice for the lawyer to give evidence.
S. 4.02(2) A lawyer who is a witness in a proceeding must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted. [This section reflects the idea that you can't be a witness and advocate] [***will probably have to evaluate the statement of a lawyer in an affidavit***]

**Practice Note:** As a general rule, BG suggests to not swear an affidavit as a lawyer; instead look to someone else usually someone else has knowledge and experience and could do it. You risk saying something in affidavit that **may waive solicitor-client privilege**; furthermore, you can get cross examined

**Rules regarding affidavits set out in Rule 22-2**
**The key rule: 22-2 (12) an affidavit may state only what a deponent would be permitted to state in evidence at trial, 22-2 (13)** an affidavit may contain statements as to the deponent's information and belief, if it is made in respect of an application for an order that does not seek final relief or where leave of the court has been obtained + if the source of the information is given

**Interlocutory order:** Can include things witness has been told as long as source is identified [***Haughian***] + witness confirms they believe it to be true
**Final order =** can't include things witness has been told [unless wi hearsay exception]

**Striking portions of an affidavit:** if an affidavit served is defective, the party can apply under **Rule 22-2 (12) or (13)** to have the defective portions struck in advance of the hearing on the merits

***Tate v. Hennessey, (BCCA 1901)***
**An affidavit based on information and belief must identify the grounds of his information or belief. Where this is not so, such affidavits "are worthless and ought not be received".**
Appeal from an order setting aside an order granting plaintiff leave to serve outside British Columbia, where application was based on affidavit given on information and belief but where the grounds for information and belief were not given

***Haughian v. Jiwa, 2011 BCSC 1632***
*Involved a MVA. Application by the defendant to strike certain portions of the affidavits filed by the plaintiff in the summary trial application. Plaintiff sought to rely on what they said in discovery.*

- Affidavit evidence in a summary trial remains subject to the rules and evidentiary requirements applicable at trial
- Limited use of discovery evidence: A party who is adverse in interest can rely in discovery evidence can rely on it; but the party who gave the discovery isn't supposed to rely on it for direct evidence. Plaintiff couldn't rely on own evidence in discovery as evidence
- **Per BG, policy reason for this**: as party conducting discovery you should be able to ask whatever you wan in order to find out what the case is and risk getting bad answers
- The court has the power to strike inadmissible evidence from affidavits
- Affidavits should be confined to facts and should not include personal opinion, editorial comment or argument
- Keep in mind the limited use that may be made of hearsay evidence [admissible on a interlocutory application as long as the deponent sets out the source of the information, or in other words, the evidence giving rise to this belief]

## Applications

Applications are dealt with in chambers, subject **to limited exceptions**:

- **Consent** applications: Rule 8-3
- Applications of which **notice is not required**: Rule 8-4
- Applications by **written submissions:** Rule 8-6

All other applications brought in chambers:

- Generally: Rule 8-1 timelines; requirements
- Urgent applications: Rule 8-5 exceptions to timelines set out in 8-1

**Basic procedure for applications other than summary trial:**

- Applicant files and serves, **at least** 8 business days before the date set for hearing, the notice of application and affidavits and documents in support
- **Within 5 business days** after service, the application respondent files and serves and application response and the affidavits and documents in response
- **Distinction btw 'at least and within'**
- The applicant may then file responding affidavits no later than 4pm, one full business day before the date set for hearing
- If an application is opposed, the applicant must provide an application record to the registry no later than 4pm, one full business day before the date set for hearing
- **Practice note:** Courteous to phone and ask whether someone is available for a particular date

**Notice of Application**

- A notice of application must be in Form 32, and must not exceed 10 pages in length
- A NOA sets the date and time of the hearing and sets out the following: Part 1 – Order sought; Part 2 – Factual Basis; Part 3 – Legal Basis [***Zecher v Josh***]; Part 4 – Material to be relied on
- Evidence required to prove the facts necessary for the court's decision will generally be by way of affidavits: Rule 22-1(4)
- **Service:** You must serve a NOA and supporting affidavits on each party of record and any other person who may be affected by the order sought: Rule 8-1(7)

***Bache Halsey v. Charles, (BCSC 1982)***

**The rules require that your application gives proper notice to what it is you are asking the Court to do**

On an application in chambers, the plaintiff obtained an order that the defence be struck out and that the plaintiff recover judgment against the defendant. On appeal, the defendant contended that the court was without jurisdiction to grant judgment **since judgment was not sought in the form of motion**.

**HELD:** the default judgment was set aside as a nullity on the basis that notice was not given; a defendant ought not be left to guess at the relief that is being sought; it should be specifically enumerated.

***Zecher v. Josh, 2011 BCSC 311***

**The notice of application must properly express relief sought, arguments and the legal authority for it**

*Application for documents and other relief dismissed because of deficiencies in the application materials [both factual and legal basis were lacking; legal basis simply cited rules]. Defendant was asking the plaintiff to do a calculation related to the claim in advance of trial; Master rejected the idea that there was authority to require a plaintiff to create documents {even if there was, it wasn't included in the legal basis]*

At para 27:

- Properly expressing the relief sought and the authority for it is no trifling thing; to misstate the authority for the relief sought can mislead the other part and can, therefore, result in refusal of the relief sought.

Points of note:

- The form of the NOA is intended to provide the court and the opposing party with full disclosure of the argument to be made in chambers [whole point of the application process!].

- In legal basis section, common law authorities can and should be provided, together with a brief legal analysis.

Application response is in Form 33 not exceeding 10 pages consisting of:

- Part 1 – Order(s) consented to
- Part 2 – Order(s) opposed
- Part 3 – Order(s) on which no position is taken
- Part 4 – factual basis
- Part 5 – legal basis
- Part 6 – material relied on

**NOTE:** Notice of application and Application Response intended to give meaningful notice; not pro forma documents. For short applications (under 2 hours), no party may file or submit to the court a written argument in relation to the application other than that included in the notice of application or application response (Rule 8-1(16))

## Time

Rule **22-4** governs the calculation of time.

Also relevant:

- **Rule 8-1**: definition of "business day" "any day the registry is open for business"
- **Rule 4-2(3)-(6)** and **4-3(7**): rules for service
- ***Interpretation Act***, s**. 29** and **s. 25(4);** adds a level of abstraction to counting days in that it defines "clear days" based on certain descriptions that are used on sections that are cited

EXAMPLES:
**Rule 8-1(8**): **service of a notice of application** "at least 8 business days before the date set for hearing" [SO-exclude first day and last day of the period; don't count hearing day as a day and don't count the first day that the thing arises at your friend's office]. Ex: send notiCe of application on Monday, don't start counting until Tuesday—don't count last day/hearing day itself so earliest you could set application for the Friday]
**Rule 8-1(9)**: **time for responding** is "within 5 business days". [**Don't count first day but do count day of delivery or things; all relates to business days** Get on Monday; don't count that day but do count the last day. Counting the day you deliver it, 5 days deliver your response]

## Orders

The result of the court process, if taken to its conclusion, is an order from the court. Note that **Counsel drafts this order**

Rule 13-1 sets the rules in respect of orders, including

- How an order is **drawn and approved**
- The **form** of order
- When an order is **effective** [the date it is pronounced, unless the Court orders otherwise]
- How the form of order may be **settled**
- How orders may be **corrected** [can correct a mistake in an order, correct an errors from an accidental slip or omission, also to provide for a matter that should have been but was not adjudicated on (note: in addition to these rules, the court has an inherent jurisdiction to correct its orders)

### *Halvorsen v. British Columbia (Medical Services Commission), 2010 BCCA 267*

**Court orders should, on their face be clear and not require resort to secondary sources**

*Appeal from dismissal of application for certification allowed but form of order was vague and uncertain.*

- At para 18: it is the responsibility of the parties, with the assistance of the registrar, if necessary, to prepare orders that give definitive expression to the decisions of the courts. Court orders should be clear, complete and intelligible on their face so that those who are affected by them or must act on them will readily see what rights have been declared and what directions given. They must be susceptible of performance. Thus, they **should not require resort to extrinsic sources, such as to the pleadings or evidence of the reasons for the decisions … [original order said "for disposition in accordance with the Reasons for Judgment of the Court]**

## Interlocutory Appeals

**Rule 18-3(1):** If an appeal or application in the nature of an appeal, from a decision, direction or order of any person or body, including the Provincial Court, is authorized by an enactment to be made to the court or to a judge, the appeal is governed by this rule to the extent that this rule is not inconsistent with any procedure provided for in the enactment. [*Rule includes form, direction, conduct of appeal, application for directions, service of notice of appeal, powers of court, notice of hearing of appeal, notice of abandonment of appeal*]
Examples: *Small Claims Act*, s. 5(1); *Supreme Court Civil Rules*, Rule 23-6(8)

**Rule 23-6** governs the procedure for appeals from a decision or order of a master. Appeals are heard by a judge of the Supreme Court. The relevant rules are as follows:

- A person affected by an order or decision of a master may appeal the order or decision to the court: **Rule 23-6(8)**
- The appeal must be made within 14 days of the order or decision complained of: **Rule 23-6(9)**
- An appeal is not a stay of proceeding unless so ordered by the court or the master: **Rule 23-6(11)**

### *Abermin Corp. v. Granges Exploration Ltd., (BCSC 1990)*

**Review of a purely interlocutory decision of a master is a true appeal and the master's decision shouldn't be interfered with unless it is clearly wrong; a question of law, a final order or a ruling that raises questions vital to the final issue in the case are reviewed by way of a rehearing on the merits based on the record before the Master**
*Plaintiff sues to recover an investment of 17 million in a defunct gold mine on grounds of fraud and misrepresentation. Plaintiff assigned in bankruptcy, defendants issued motions seeking orders for security for costs. Master granted motion on the condition that the examinations for discovery then then scheduled not proceed until the disposition of those applications. Plaintiff argues that the master was without jurisdiction to make the order claiming that it was either relief injunctive in nature or a "final order" where determination of fact and law was required; Court says that the context was an interlocutory one and thus within the jurisdiction of the master*
**HELD:** appeal dismissed; order of the Master confirmed.

- An appeal from a master's order in a purely interlocutory matter should not be entertained **unless the order was CLEARLY WRONG.**
- But, interlocutory rulings by a master which are final orders or which raise questions vital to the final issues, or are matters of law require a rehearing on the merits on appeal. On a re-hearing, a judge may substitute his discretion for the discretion exercised by the Master. On a re-hearing, the judge is unfettered by any deference to the order under appeal.
- While it might be appropriate to adduce new evidence in some circumstances [ex: there is an order made for the production of fresh evidence], the general rule is no filing of new materials. Thus, not clearly de novo; is only a rehearing of same evidence that Master had before him or her;

### *Ralph's Auto Supply (BC) Ltd. v. Ken Ransford Holding Ltd., 2011 BCSC 999*

Questions whether Abermin should be reversed. Abermin has been overruled in ONT; middle ground test had been abandoned. CA in ONT sat a full panel of 5 and concluded that there shouldn't be a different standard of appeal because that was rooted in outmoded sense of hierarchy, however the role of masters in Ont had expanded.
Held: Court found that they *were* bound by Abermin; still the law in BC

- What is the justification for continuing to apply a different standard of review to decisions made by Masters?
- **Do you agree with the judge in this decision? [FLAG FOR EXAM PURPOSES; possible essay]**

## Appeals from a Judge

- An appeal lies to the Court of Appeal from an order of the Supreme Court, except where an appeal is excluded by legislation. See *Court of Appeal Act*, s. 6. For example, the Small Claims Act allows an appeal to the Supreme Court but not to the Court of Appeal.
- An appeal is from the order of the trial judge, though, the Court of Appeal considers the reasons for judgment in its review of the order:
- The broad right of appeal is limited in two ways:
    - A ruling on evidence made by a trial judge during the trial process is not an order and therefore the Court of Appeal has no jurisdiction to hear the appeal: ***Rahmatian v HFH Video Biz***

- Certain enumerated interlocutory orders are limited appeal orders under the *Court of Appeal Act* and *Court of Appeal Rules*. These orders may only be appealed with leave.

"A reviewing court may refer to the reasons for judgment in order to ascertain whether the decision from which the appeal is brought has been arrived at by a reviewable error but the appellate review process relates to attacks on the order that has been made, not the reasons for judgment. If an appeal is successful, it is the order that is set aside, not the reasons or a portion thereof that is 'overturned'".

LEAVE TO APPEAL is required in some cases:

- An appeal does not lie to the Court of appeal, from a limited appeal order without leave of a justice of the Court of Appeal: *Court of Appeal Act*, s. 7.
- Limited appeal orders are exhaustively defined in s. 2.1 of the Court of Appeal Rules.
- Examples: orders made under Part 5 (case planning), Part 7 (procedures for ascertaining facts), orders granting or refusing adjournments or an extension or shortening of time, orders granting or refusing costs, etc.

***Rahmatian v. HFH Video Biz Inc., (BCCA 1991)***

**A ruling by a trial judge on a no evidence motion is not an order or judgment of the court and cannot be appealed until after the trial has been completed**

At the conclusion of the plaintiffs' case, the defence made a motion for non-suit [basically a no evidence motion]. It was dismissed. Before proceeding to call the defence, the defendant filed a notice of appeal. At the appeal, the plaintiff took a jurisdictional objection on the ground that there is no order to appeal against.

**HELD: A ruling by a trial judge on a no evidence motion is not an order or judgment of the court and cannot be appealed until after the trial has been completed**. It is more properly described as a ruling or a ruling on evidence, which is part of the trial process and is not appealable until after the trial has been completed. Of course, such a motion, if successful, results in a dismissal of the action from which the plaintiff can appeal as of right.

***Power Consolidated (China) Pulp Inc. v. B.C. Resources Inv. Corp., (BCCA 1988)***

**Sets out the test for leave; it is still applicable even though created in regime depending on whether the order of SC was interlocutory or not; still test for limited appeal orders**

Application for leave to appeal from a decision holding that disclosure of part of a letter did not waive privilege as to the remainder of the letter.

**HELD:** the factors bearing on the granting of leave to appeal include:

(1) whether the point on appeal is of significance to the practice;
(2) whether the point raised is of significance to the action itself;
(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; (question is not whether the appeal will succeed but whether the points raised are arguable?)
(4) whether the appeal will unduly hinder the progress of the action.

- QUESTION: is it in the interests of justice that leave be granted?
- In the result, leave was granted. Point was of significance to the practice, raising questions of law as to the waiver of privilege, may be significant to the action, appeared to have some merit and it was agreed that an appeal would not unduly hinder the progress of the action.

# Summary Proceedings

## Summary Judgment

### Rule 9-6

This application allows a plaintiff to apply for final judgment (on all or part of the claim) or a defendant to apply to have a claim finally dismissed.

The underlying purpose of the section is the **speedy disposition** of uncontested or uncontestable actions; to **reject**, **promptly** and **inexpensively**, claims and defences that are **bound to fail at tria**l and to provide a **mechanism for determinations of disputed issues of law alone** provided the legal question is dispositive of an issue allowing the court to pronounce judgment. [T]rying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system [***Haghdust v British Columbia Lottery Corporation***]

This is an unusual remedy and not frequently granted. **Strategy:** Litigants who seek to argue against such an order often have strong arguments that the **purpose** of the rule wouldn't be achieved if the order was granted. Courts are generally sympathetic to the idea that a litigant must be allowed their day in Court; and must not be deprived of a trial unless it is manifestly clear that they are without a defence that deserves to be tried.

Summary judgment is available to both plaintiff (**Rule 9-6(2))** and defendant (**Rule 9-6(4))(**or third party)
I) after exchange of pleadings
Ii) where the court is satisfied that (**Rule 9-6(5))**:

- there is no genuine issue for trial; or [**Strategy**: *argument advanced by counsel would be something like: "this can be determined right now based on facts as you see them.. or this issue is not important enough for trial…. Enough here to dismiss the claim"*.
- no genuine issue, except as to amount; or [Note that it is not the function of the Court to try disputed issues of fact].
- the only genuine issue is an issue of law.
- ***Hadhdust v British Columbia*:** **Considerations specific to this sub-rule; should only be applied where:** there is no dispute about the material facts; the issue of law is not mixed up with the facts; and the issue of law is well settled by authoritative jurisprudence. *use with caution; New feature in this rule: allows a court to determine questions of law, but questions of law are limited and if they are determinative of the judgment itself

**Test: whether there is a *bona fide* triable issue to be determined; Court must be satisfied that it is "plain and obvious" or "beyond a doubt" the action will not succeed. The application should be dismissed if the Court is left in doubt whether there is a triable issue** Note: this is almost equivalent to the criminal BARD standard; high onus.

- It is NOT the function of the court on a Rule 9-6 application to try disputed questions of fact – the only question is whether the facts raise a bona fide triable issue (or genuine issue).
- No weighing of facts – simply the presence of facts to support a given position, ex: this was the Limitation period, action is beyond it and here are the dates
- **Strategy**: Responding to this as counsel→ argue not manifestly clear; valid issues; deserve day in Court
- Example of a likely successful application: action that is statute barred; brought outside the Limitation Period; pretty crystal clear that the case should be set side
- Whether or not to pursue summary judgment or summary trial is a **tactical decision**: based on what you are trying to accomplish

***Haghdust v. BCLC, 2011 BCSC 1627***

**Matters raised were largely legal, they were novel, not settled by authoritative jurisprudence and raised factual components. The issues should be determined with the benefit of a more fulsome factual record**

*Claim against BCLC for jackpot winnings denied to the plaintiffs while enrolled in a voluntary self-exclusion program. The defendants applied for judgment under Rule 9-6 on two grounds: 1) claim is precluded by the Voluntary Self-Exclusion rules that apply, or 2) alternatively, on the basis of illegality. The plaintiffs argued that their responses to these issues raised genuine issues for trial (either as questions of mixed fact/law or question of law that should not be determined summarily). The plaintiffs asked that the application be dismissed and legal issues resolved in their favour.*
***HELD:*** Application dismissed. The plaintiffs were not bound to fail. Further, the application should not be resolved based on s. 9-6(5)(c).

- While the matters raised were largely legal, **they were novel**. The Act has changed from the time the P's had signed their agreement; no authoritative jurisprudence on the issues they had raised that the Court could easily rely on and raised factual components.
- The issues should be determined with the benefit of a more fulsome factual record. As to other legal issues raised, a determination on these issues is not appropriate where they would not allow the court to pronounce judgment on at least part of the claim.
- Underlying purpose of summary judgment: **heavy price of unmeritorious claims**; need to filter out the claims that should not be there
- Limited use of rule 9-6(5)c; involves cases raising just a question of law; only to be used if there is no real dispute as to material facts; no settled by authoritative jurisprudence→ intended to allow court to determine whether on a summary basis there is a genuine question of law standing btw the plaintiff's claim and judgment
- Not the function to determine questions of law that are germane to a proceedings; this rule is not specifically for that unless it deals substantially with part of the claim [9-4 and 9-3 are for those purposes]
- The Court concludes no genuine issue for trial; the Court must pronounce judgments; however, in determining whether the only genuine issue for trial is a question of law, the court retains residual discretion and "may determine the question and pronounce judgment accordingly"
- Court won't turn its mind to a question of law unless it will change something about the potential resolution of a claim; tension btw a full blown trial and the rule

**Rule 9-6: Summary Judgment Evidence?**

There is no express requirement for plaintiff to lead evidence. If evidence is provided, it will primarily be in affidavits form [which are required to be first hand knowledge]. **Rule 9-6(3)** requires evidence from defendant in limited circumstances

- BUT, see ***International Taoist Church***, 2011 BCCA 149 paras 13-15: "Rule 9-6 does not contain a provision prohibiting the receipt of evidence. *The rule replaces R. 18 in the previous rules. Rule 18 required affidavit evidence. I find it curious that R. 9-6 does not specifically provide for affidavit evidence except in response to a plaintiff's application.* ***It is inconceivable to me; however, that a plaintiff could overcome a filed defence and obtain summary judgment under the new rule in the absence of sworn evidence that proves the claim****.*
- *It is also inconceivable to me that a defendant could obtain summary judgment without presenting sworn evidence establishing that the claim is without merit. In either case, if the court is faced with oath against oath [akin to weighing evidence] it is most unlikely that it could grant judgment to the plaintiff or dismiss the claim, as the case may be. …*
- In my opinion, the chambers judge was obliged to dismiss the application for summary judgment under Rule 9-6 because of the absence of sworn evidence establishing that the claim was without merit." [party must meet onus; so adduce some evidence otherwise you won't accomplish your goal]
- **Courts: don't rest on just the pleadings if you are relying on material facts that say there is no genuine issues**
- Other points: wi jurisdiction of a master, although final where it does not require a determination of law; but where it is a disputed issue of law; not wi masters jurisdiction→ where the only question is whether a triable issue exists that it is wi the jurisdiction of a master.
- Effect of the application: to decide an issue in the litigation; cannot be re-litigated at trial; decision from the judge decides the issue rule
- where is only whether a triable issue exists; where does not require determination of fact or law; if calls for a determination of an issue of law it is not within jurisdiction of a master

## Summary Trial

A summary trial is essentially a means of obtaining judgment without a conventional trial; can apply for judgment "on an issue or generally". The matter is resolved on the basis of documentary evidence and can be said to be a "paper trial". **The result is a final disposition of the case (or at least one or more issues**). The rule is intended to address the classic complaints wrt to litigation: it costs too much and takes too long. BC was a pioneering jurisdiction in adopting this rule, and now up to 50% of trials in BC take place according to this mechanism. BC Courts generally take a robust view of what can be resolved summarily.

Summary trial is distinct from summary judgment: Under **Rule 9-6**, a genuine issue for trial will torpedo the entire application, but under **Rule 9-7** those issues are tried!

**The overarching consideration for a 9-7 application is summary trial a suitable mechanism? Strategy:** arguing that it is not a suitable mechanism

**Rule 9-7** is better suited for deciding novel points of law because on summary trial the Court will have a more complete record framing the question of law

Summary trial is available in respect of: an action; a petition converted to an action; a third party proceeding or a counterclaim, as long as a responding pleading has been filed **(Rule 9-7(2))**

- must be brought on for hearing at least 42 days before a scheduled trial date **(Rule 9-7(3)).**
- BUT: not every case is suitable for summary trial.

Evidence: Primarily affidavits (but not on information and belief as the application is in the nature of a trial – hearsay is not admissible; **only first hand knowledge is admissible**)
Can rely on the following:

- extracts from XFD transcripts (also possible to obtain an order for cross-examination on affidavit (**Rule 9-7(12)(b))**
- Affadavits: Affidavits containing information and belief are admissible for the purpose of determining the suitability issue, but not for deciding any substantive issues on summary trial: ***Charest v Poch.***
- an answer or part of an answer to, interrogatories
- admissions
- expert opinion
- deposition evidence
- BUT NOT on pre-trial examination of a witness
- Also notable that witnesses may refuse to provide affadavits and thus essentially "refuse to testify"

| **Summary Trial Procedure** | |
|---|---|
| Bring and respond to | Rule 8-1 governs materials to be provided and applicable time limits |
| Application for preliminary directions | Before a judge or master: Rule 9-7(13)<br>Rule 9-7(11): challenge to suitability: can be dealt with preliminarily; court will usually deal with this issue by itself; as part of response to summary trial can argue it is not appropriate or set down an application before. This is a very important issue in summary trial<br>Rule 9-7(12): directions as to evidence and conduct of application [EX*: can ask for adjournment for further document exchange, oral discovery, cross examinations on affidavits—but once you receive notice of this type of application you have to prepare for it; i.e by failing to take advantage of pre-trial procedure the respondent cannot frustrate the proceedings*]<br>9-7 (15): may decline judgment if unable to find the necessary facts to give judgment, or if it would be unjust to do so |
| Hearing in chambers | Before a judge (not within the jurisdiction of a master)<br>Challenge to suitability (either at the hearing, or on a preliminary application). See Rule 9-7(11). |
| Judgment | Grant judgment on an issue or generally; or Decline to grant judgment if the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law or it would be unjust to do so. [reservation is intended as a safeguard; added layer of equity—court will look at whole thing to see if they will give judgment; Matter can be remitted for trial; or expedited trial list] |

**Suitability is the key question.** Where a summary trial can achieve the ends of justice and save the parties either or both time and money, it is to be preferred.

Considerations per ***Inspiration Management***

- Are the issues raised by the summary trial application suitable for disposition on a summary basis?
- Note that determining suitability can be a large proceedings in itself [ex: hear evidence for three days; should we now remit it for trial? That itself can be an issue]
- Will the summary trial application assist the efficient resolution of the proceeding?
- Court is concerned with the efficiency of the process; Judge can say: "I've heard enough", can stop the party at any stage and say, lets move into summary trial proceedings
- Does the court have the necessary facts to decide the issues?
- Would it be just to render judgment in the case where trial is by way of a summary process?

**Test for suitability per 9-7 15 (a): The Court may grant judgment in favor of any party, either on an issue or generally, unless it is: Unable to find the facts necessary for decide the issues, after considering all of the evidence before it; or ii) of the opinion that it would be unjust to decide the issues on the application**

**Section 9-7 (11):** On an application heard before or at the same time as the hearing of a summary trial application, the Court may: a) adjourn the summary trial application, or b) dismiss the summary trial application on the ground that (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or the summary trial application will not assist the efficient resolution of the proceedings

**Question of suitability may arise at various stages:**

1. On application of one of the parties under Rule 9-7(11)
    1. on a preliminary application before the summary trial application (see ***Western Delta Lands***); or
    2. at the same time as the summary trial application (***Charest v. Poch***)
    3. in either case: suitability and efficiency are the focus
2. At any other time in that the judge retains a discretion to assess the appropriateness of determination of the matter on a summary basis and refuse to grant judgment if unable to do so or, if to do so, would be unjust . See Rule 9-7(15). [can be remitting to trial list—always this overarching discretion; always advisable to let Court know that suitability will be an issue at the outset.]

***Inspiration Management v. McDermid, (BCCA 1989)***

*Appeal from dismissal of an application by the plaintiff for judgment pursuant to Rule 18A (now, Rule 9-7). Chambers judge had decided "**it was not clear that a trial in the usual way could not possibly make a difference in the outcome**". Dismissed the application on that basis; the CA convened a 5 judge panel and concluded that isn't the correct test. Context: had been a trend that other courts had been deciding trials on the basis of that test and writes a new test. The dispute was over the terms of a loan agreement – what was the agreement, what collateral had been agreed to.*

***HELD:*** The judge did not apply the correct test. Further process was required (cross-examination on affidavit), **but this case was suitable for resolution by summary trial**. Per Lambert J.A. "unresolved issues of fact are within a sufficiently narrow compass to make management of the case under Rule 18A a preferred alternative to the trial list". Court recognizes that the volumes of litigation, urgency of some cases and costs of litigation do not permit the luxury of a full trial with all traditional safeguards in every case, particularly if a just result can be achieved with a more expeditious process.

Factors relevant to determination of suitability:

The judge lays down an open ended list:

General considerations: t

- The amount involved,
- Complexity of the matter [complex matters properly prepared can be done this way],
- Its urgency,
- Any prejudice likely to arise by reason of delay,

- The cost of taking the case forward to a conventional trial in relation to the amount involved [ex: cost of conventional trial would succeed the amount at issue],
- The course of the proceedings [how far along are you] and
- any other matter the court considers relevant [this is an open list].
- Sufficiency of the evidence: is the evidence sufficient for adjudication? [Don't want the feeling: "there is someone important here that we haven't heard from"]
- Whether the applicant is "litigating in slices": Litigating in slices is essentially a summary trial on a subset or narrow issue where the matter may have to proceed to conventional trial in any event. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. Deciding the dispute in this way won't encourage orderly determination of the matter; Court is also thinking about consistency in the process
    - BUT: will a determination on a critical issue could lead to settlement between the parties on other matters. Thus there isn't an absolute prohibition against "litigation in slices", is done for instance, summary trial on liability and then conventional trial on damages in a car accident claim
- Conflicts in the evidence: a judge shouldn't decide an issue on the basis of conflicting affidavits, even if he or she prefers one over the other. However, other admissible evidence may allow the judge to resolve the conflict.
- Other: factors relevant to determination of suitability are open-ended.
- Note: Court can allow some cross examination on the affidavits

Additional concerns regarding suitability: whether a necessary witness is refusing to provide affadavits, whether a litigant is self represented [may have more trouble at summary trial than other trial]

### *Charest v. Poch, 2011 BCSC 1165*

*Application for summary trial and question of suitability heard concurrently. Plaintiffs were claiming to be the beneficial owners of a portion of certain lands owned by the defendants, and seeking a declaration to that effect or damages. Defendants apply to have a plaintiffs application dismissed as well as judgment on their counter claim for an order granting them vacant possession of the property at issue.*

Plaintiff's argument: not suitable for a summary trial; there are credibility questions on core issues and those issues are complex; also seek to perhaps amend statement of claim;

Defendants argument: notwithstanding conflicts in affidavit evidence on the evidence that it not in conflict, the plaintiff's cannot succeed on their claims as presently pleaded.

***HELD:*** Application for summary trial granted in part. The fact that the plaintiff wished to amend its pleadings was irrelevant to the application. Summary trial procedures cannot be frustrated by one of the parties delaying the pre-trial procedures. The fact that application raises issues of credibility on essential issues will not be a bar where those issues can be resolved by reference to other materials. A summary trial is appropriate even though it will dispose of the matter only if decided in favour of the defendant.

Procedure for determining if a matter is suitable for being tried summarily:

i. Are there sufficient facts before the Court in which to make the necessary findings of fact?
ii. Is it unjust to decide the case on a summary trial application?

- Where the Court is able to find the facts necessary to decide the issues before it, and it is not otherwise unjust to decide the issues before it, and it is not otherwise unjust to decide the matter summarily, the Court should give judgment!
- Conflicts in evidence may be resolved by other means [other evidence]: the mere fact of a conflicting affidavit may not bar a summary trial→ quote from ***Inspiration Management***
- Hearsay in affidavits can be heard before or at the same time as the hearing of the summary trial
- The defendant's issue is not inappropriate for summary disposition because deciding the matter summarily will enhance the administration of justice

### *Western Delta Lands v. 3557537, (BCSC, 2000)*

*Claim* for damages of $19.5 million for alleged breach of a partnership agreement. The defendants applied, before the summary trial, for an order dismissing the plaintiff's summary trial application on suitability grounds.

***HELD:*** A preliminary application to have a summary trial application dismissed on suitability grounds will fail if: a) the summary trial itself is likely to take a considerable time or b) where the question of suitability is relatively obvious, eg: where credibility is a crucial issue; c) it is aclear that a summary trial involves a substantial risk of wasting time and effort of producing unnecessary complexity; or d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial

Otherwise, preliminary applications on suitability impose another costly layer of litigation on the parties. In this case, the defendants failed to establish lack of suitability notwithstanding some complexity and significant amounts claimed. The claim involved an ongoing partnership and should be determined as soon as possible.

- Might not want to deal with in advance when substance of the evidence will be same of that of the whole matter
- Here large claim; a lot of evidence; 17 binders of material and 50 authorities; there also was some urgency as it related to an ongoing partnership; parties wanted it to be heard as soon as possible; there is a process where the case can be managed; provided for under the rule→ single judge hears all applications; likely that resolving some issue [clearly very long case]
- "Where question of suitability can be dealt with independently and not mixed in with determination of issues themselves can deal with sooner"
- Court doesn't want the preliminary ruling to fetter the discretion of the summary TJ to decide whether disposition of Rule 18A would be appropriate, counsel who is opposed to proceeding summarily could effectively have two kicks at the can

## Special Case

### Rule 9-3

**What:** an alternative summary procedure by which a question of law or fact, or partly of law and partly of fact is stated for the court in the form of a special case for the opinion of the court

**When available:**

- any time, by agreement of the parties; or
- in the absence of agreement, by order of the court (court will consider whether there will be a saving of expense to the parties, and a saving of time of the court itself, in separating out the question; or whether the question ought properly to be determined in the main proceedings)

**Process:** signed statement of facts necessary to enable the court to decide the question (from which the court may draw inferences)

**Result:** decision of the court is in the form of an opinion, which may serve as the basis of an order for judgment or for special relief, only if the parties consent (see Rule 9-3(5)).

### *William et al v. British Columbia et al, 2004 BCSC 964*

***Facts:*** court directed parties to state a case [court on its own motion] but the parties were unable to agree on the facts to be stated

***Held:*** case was not appropriate for determination under Rule 9-3 because:

1. There was no question of law that would dispose of the central issue in this case – the claim depends, as well on complex issues of fact
2. No agreement on facts and Rule 9-3 provides no mechanism for resolving disputed issues of fact, requiring trial in the usual way
3. Considering the importance of the case, the case should not move forward on the basis of assumed facts (an opinion on assumed facts will only be as good as the assumptions).

**Note**: in general, a court is required to act judicially and not in an advisory or consultative capacity and so will not ordinarily consider hypothetical questions based on assumed facts (but could exceptionally where determination of hypothetical question will have a conclusive effect) cites Jaz v Callaghan: fight btw joint venture partners; physical

partition of property at issue was not possible; applied for determination of issue that would have a conclusive effect on the litigation [wanted to know the issue in advance; if so, would probably settle… would abandon petition based on the issue—it was a clear case to determine a hypothetical question that would resolve the litigation]
***Is a rare remedy**

## Proceedings on Point of Law

Proceedings on a point of law is a mechanism via which the court can consider a question of law on the basis of the facts alleged in a pleading. Per Saunders J in ***Harfeld v Dominion of Canada General Insurance Co***: "the general purpose of Rule 9-4 is to provide a way to determine without deciding the issues of fact raised in the pleadings, a question of law which goes to the root of the action". Facts in the pleadings are assumed to be true. No evidence. Consequently, Counsel will not want to use this rule if you contest the facts. This application can be brought at any time before the trial

**Point of law may be set down for hearing** (1) A point of law arising from the pleadings in an action may, by consent of the parties or by order of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial.
**Court may dispose of whole action** (2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

**Limitations:**
- The point of law **must arise from the pleadings**
- It must be a **pure point of law** (eg. not causation which is always a mixed question of fact and law)
- **Not available where there are contested facts** or the need to weigh evidence
- If the action involves investigation of a serious questions of law or of general importance – general preference that those matters be determined by reference to a full factual context
- If the issues are too complex the Court won't agree this is an appropriate process

**When available**:
- At any time before the trial
- By consent or by order:
    - Note: Whether a point of law should be decided before the trial is **discretionary** – it must appear that a determination of the question will be decisive of the litigation or a substantial issue raised in it. THE QUESTION TO ASK: **will a determination shorten the trial or result in a substantial saving of costs?**

**Result:** If the decision on the point of law substantially disposes of the whole action or of a particular claim, the court may dismiss the action or make any order it considers will further the object of the rules.
See Rule 9-4(2).

### *Harfield v. Dominion of Canada General Insurance Co., (BCSC 1993)*

*Plaintiff sought to have determination of question of whether insurance policy excluded coverage for loss caused by an insane person.*
***Held:*** The point of law arose from the pleadings, no requirement for determination of facts (no dispute as to the terms of the exclusion clause) and the determination would result in the determination of a substantial issue in the action, with potential of significant savings in time, expense and energy (eg. if decided against the plaintiff, no need to prove insanity).

## Striking Pleadings

This rule enables parties to enforce the rules of pleadings [**Rule 3-7** page 16] + stop cases from proceeding that shouldn't have been started. A 9-5 application can be instituted at any stage of a proceeding. The ***only*** issue under a 9-5 application is the ***sufficiency*** of the pleadings; the application is not a decision on the merits and the party is open to try their case again (as long as they don't run afoul of relevant limitation periods.

So essentially, **9-5** empowers the court to either: i) **strike out or amend** the whole or any part of a pleading, ii) **pronounce judgment**, **stay** or **dismiss** a proceeding or iii) **order that costs** of the application be paid as special costs.

**Rules 9-5(1)(a): where the pleading discloses no reasonable claim or defence.**

**Per *Carey*, the test is: assuming that the facts as stated in the Notice of Claim can be proved, is it "plain and obvious" that the plaintiff's claim discloses no reasonable cause of action?**
Evidence: none is admissible on a 9-5 application. See Rule 9-5(2).
Examples of striking pleadings out on a 9-5 application: the claim is not known to law; material facts required to establish the cause of action are not pleaded and could not be pleaded on an amendment.

### Rule 9-5

At any stage of a proceeding, the court may order to **be struck out** or **amended** the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses **no reasonable claim or defence**, as the case may be,
(b) it is **unnecessary, scandalous, frivolous or vexatious,**
(c) it may **prejudice, embarrass** or **delay** the fair trial or hearing of the proceeding, or
(d) it is otherwise an **abuse of the process of the court**, and

the court **may pronounce judgment or orde**r the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs
(2) No evidence is admissible on an application under subrule (1) (a).

### *Carey Canada Inc. v. Hunt, (SCC 1990)*

**Affirms plain and obvious test: is it plain and obvious that the pleadings will not succeed?**
*Plaintiff commenced an action in conspiracy for personal injuries suffered by reason of exposure to asbestos. Alleged that the defendant, who was involved in mining and production of asbestos products knew that the fibres could cause disease in those exposed to the product. The defendant Carey sought to strike out the claim pursuant to Rule 19(24)(a) (now, Rule 9-5(1)(a))*.
At issue: in what circumstances may a statement of claim (or portions of it) be struck out? Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

- ***Held:*** confirmed the plain and obvious test. Made clear that the purpose *is not to ask whether* the plaintiff will succeed.
- Test is: Pleadings may only be struck out under Rule 9-5 (1) if it is "plain and obvious", assuming that the facts pleaded are true [pursuant to Rule 9-5 (2)] that the claim discloses no reasonable cause of action, or if the action is "certain to fail". Neither the length of complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceedings with his or her cases. **Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of the statement of claim be struck out.** [para 33]
- e: Question is focussed on whether the pleadings **disclose a radical defect making it plain and obvious that the plaintiff will not succeed.**
- Here, although the tort of conspiracy had not previously been extended to personal injury cases, there was no decision precluding its extension. The claims as pleaded, came within recognized categories of the tort of conspiracy and raised a triable issue.

- In fact, "where a statement of claim reveals a difficult or important part of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general and law of torts in particular will continue to evolve to meet the legal challenges that arise in our modern industrial society [para 55].

### *Willow v. Chong, 2013 BCSC 1083*

*Plaintiffs (traditional Chinese medicine doctor and affiliated college) brought claims against defendants relating to issues surrounding the closure of the plaintiff college. The college had been operating to grant degrees that were not in fact licenses to practice medicine. Some defendants brought independent applications to strike portions of the notice of civil claim*

***Held:*** Applications granted. The claims against gov agencies could not found a proper action outside of the administrative law context and were an impermissible collateral attack. The Claims against the Crown and Ministers disclosed no reasonable claim under **9-5(1)(a)** as they were not properly pleaded (incomplete causes of action). The claims against the Ministers were also an abuse of process (there was a collateral action). Plaintiffs were not granted leave to amend pleadings due to the nature of the proceedings and the extent of the omissions in material facts.

- Case notes that material facts in a notice of civil claim must be taken as true is an overarching rule, but shouldn't be taken so far to mean that allegations taken as speculations should be taken to be true; rather are the allegations *capable* of being true? It is in some cases appropriate to subject the allegations in the pleadings to a sceptical analysis, ex: in an instance where a plaintiff is making wide allegations that appear speculative

Under **Rule 9-5(1)(b),** a pleading is unnecessary, frivolous or vexatious if it:

- does not go to establishing the plaintiff's cause of action;
- does not advance any claim known in law;
- where it is obvious that an action cannot succeed; or
- where it would serve no useful purpose and would be a waste of the court's time and public resources.
- If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious.

**Rule 9-5(1)(d**): applies where the whole or any part of a pleading is an **abuse of process** of the court.

- Flexible doctrine
- Avoid violation of principles of judicial economy, consistency, finality, and to preserve integrity of the administration of justice
- Court should also consider whether defective pleadings can be corrected by way of an amendment and whether it would be appropriate to give leave to do so

Examples: an application to strike on the basis of:

- *res judicata* (already decided) or issue estoppel (could have been decided); An issue can't be re-litigated at a later time if you didn't advance the issue in earlier proceedings.
- collateral attack - the existence of another action that deals with the same issue, pursuit of a civil claim where there is a statutory remedy.
- Court should try to correct deficiencies where they can, but in this case the plaintiff's pleadings were so deficient that would not be allowed. In particular, the nature of the issues that have been raised, and the **breadth of the omissions of material facts** were key to the Court not granting leave to amend

**Distinction between Rules 9-5 and 9-6**

The major difference is the effect of a ruling in favour of the applicant; Rule 9-5 does not result in a conclusive determination of the issues, whereas a 9-6 order is conclusive as btw the parties.

9-5: attack on the pleadings on the basis that the action or the defence, as pleaded, cannot succeed as a matter of law. Raises a matter of law only. **Concerned only with the sufficiency of pleadings. Could not be the basis for a *res judicata* defence, whereas 9-6 could support a future RJ pleading**

9-6: assertion that the claim or the defence is factually without merit; raises an issue of fact only, or at most, an issue of mixed fact and law, unless under subrule (5)(c) the Court determines that the only genuine is sue is an issue of law, in which case it "may determine the question of law and pronounce judgment accordingly

# Interim Relief and Expert Reports

### Interim Relief Pre-trial Injunctions

Injunctions are a form of relief according to which the court orders a person to refrain from doing something in order to enforce or preserve a legal right. In some circumstances the court may even order a "**mandatory injunction**" compelling a person **to do something**, rather than **refraining from doing something**. Note that the test for a mandatory injunction is higher.

The BC Supreme Court is empowered to issue injunctions under: **The *Law and Equity Act*, s. 39** and the inherent jurisdiction of the court.

**Examples of conduct that can be subject to an injunction**: Destroying or disposing of property. Engaging in illegal conduct (for example blockading public spaces). Other actions that may affect someone's rights (for example holding a shareholder vote).

**OVERARCHING PRINCIPLE: Is this a fair order to be granted in the circumstances of the matter?**

**INJUNCTIONS THAT CAN BE OBTAINED PRE-TRIAL [this is out focus not permanent injunctions]**

**Interim injunctions**: orders that stay in place for a specific period of time, inherently temporary

- **Interlocutory injunctions**: orders that stay in force until trial, or until revised by further order.
- **"Special" injunctions:**
  - ***Mareva*** injunction to preserve property or assets
  - ***Anton Pillar*** order to preserve evidence

| | |
|---|---|
| **Rule 10-4** | governs the process for pre-trial injunctions. |
| **Rule 10-4(1)** | provides that a party can apply for an injunction, whether or not an injunction was sought in the relief claimed [*doesn't have to be in your original pleading*] |
| **Rule 10-4(2** | allows a party to seek an injunction ***before*** a proceeding has even commenced.<br>This provision allows parties to respond to situations of exceptional urgency. |
| Ex parte pre-trial applications | |
| **Rule 10-4(3)** | allows an injunction application to be brought without notice **(*ex parte*),** an exception to the provision in **Rule 8** that you have to give notice to any party affected by an application.<br>**WHY:** due to urgency or to avoid defeating the purpose of injunction (such as an *Anton Pillar* order). |
| **Rule 10-4(5)** | Expressly provides that an injunction order includes an **undertaking as to damages**, unless otherwise ordered. i.e, the applicant abide by any order that court may make for damages related to injunction<br>**WHY**: this provides the enjoined party some security and to provide some comfort to the court that in "pre-judging" the rights of the parties there will be a remedy if at the end of the action the injunction was not appropriate [almost like security for judgment].<br>**PER *Vieweger v. Rush*: the rule is when an undertaking is given and the case fails there is a presumed inquiry into damages unless there are special circumstances. This means more than just the order was obtained in good faith.** |
| **Rule 10-4(6)** | allows a party to seek an injunction after trial, including where an injunction "might have been" claimed. |

Note that counsel has **additional professional obligations** in the context of ex parte obligations, and applications made without notice are at an increased risk of being set aside [**Commentary 6**]

> "When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, **the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled. Increasingly, the court grants injunctions sought without notice only on an interim basis to allow the matter to be addressed by both sides and with full submissions** "

allows a party to seek an injunction after trial, including where an injunction "might have been" claimed.

## TEST FOR OBTAINING AN INJUNCTION

There are two possibly operative test for an injunction in BC. Most jurisdictions use the RJR test. In BC, free to use AG, but just make sure that all elements of RJR are covered off. The courts have sought to minimize this discrepancy by describing the two-step versus three-step test as a "*distinction without a difference*".

| **A-G v Wale** | **RJR** |
|---|---|
| **Sets out the test for an injunction in BC**<br>The test is framed in two parts:<br>**ONE**: Is there a fair (arguable) question to be tried?<br>**TWO**: Does the **balance of convenience** favour granting or refusing the injunction?<br>[consider irreparable harm here→ default to status quo if one party might get irreparable harm [the idea that damages may not be sufficient]<br>**IS IT JUST AND EQUITABLE IN ALL THE CIRCUMSTANCES TO GET AN INJUNCTION?** | The *RJR* test has three parts:<br>**ONE**: Is there a serious question to be tried?<br>**TWO**: Will the applicant suffer irreparable harm if the injunction is refused?<br>**THREE**: Who will suffer the greater inconvenience from the granting or refusal of the remedy? |

**Factors to be considered from CBC on the balance of convenience:**

- **Adequacy of damages** as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
- If damages are awarded, is it likely they will be paid?
- The preservation of contested property; [**property rights are highly valued]**
- Other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;
- **Which of the parties has acted to alter the balance of their relationship** and affect the status quo;
- Which party is altering the *status quo* can be a difficult matter to determine. There are 3 considerations:
    - which party took a step that first altered the *status quo;*
    - which party did the thing which is said to be actionable; and
    - The nature of the conduct said to be wrongful and which is continuing when the injunction application is made.
- The strength of the applicant's case;
- Any factors affecting the public interest; and [***Wales***→ public interest to protect fisheries; common when Crown is involved]
- **Any other factors** affecting the balance of justice and convenience [inclusive, NOT exclusive list].

### Attorney General of B.C. v. Wale, (BCCA 1986)

**Operative test for an injunction in British Columbia incorporates RJR three steps**

*An underlying fishing rights dispute. First Nations had passed bylaws authorizing and regulating fishing in certain rivers. The fed. gov. sought to enjoin First Nations from commencing fishing other than in accordance with the Fisheries Act.*

**AT ISSUE:** What was the appropriate test for an injunction and whether the chambers judge applied it in granting the injunction.

**Held:** The court referred to the three-step test, **but preferred to incorporate the requirement of irreparable harm into the assessment of balance of convenience**.

- **Balancing convenience** – where one party may suffer irreparable harm if the injunction is granted, and the other if it is not, the court will generally default to "preserving the status quo".
- **Irreparable harm** – is essentially equated with the adequacy of damages. It does not require "clear proof", but rather, mere doubt as to the adequacy of damages is sufficient.
- **Ultimately –** the overall test is whether it is just and equitable in all of the circumstances to grant an injunction.
- Although the chambers judge did not discuss irreparable harm, she concluded that control over the waters is essentially a proprietary claim. The injunction was to preserve the public interest in fishery and preservation of property has been treated in and of itself as a matter of irreparable harm.
- On the remainder of the balance of convenience test, the Court notes that the chambers judge considered that fishing contrary to federal regulations may affect salmon stocks.

**The Dissent:** The dissent concludes that the irreparable harm potentially suffered by each side was equivalent. The dissent therefore considers other factors, including that the federal government could have had the issue resolved previously; The dissent concludes that the matter should be left to be answered, rather than postponing a resolution. **They would have refused an injunction**.

### *CBC v. C.K.P.G. T.V. Ltd., (BCCA 1992)*

The Court confirmed that the first prong of the test is whether there is a **fair question to be tried** as opposed to a prima facie case; **The strength of the case is not considered under the first prong!**

*CBC sought an injunction to prevent its local affiliates from substituting local ads for regional ads. The chambers judge found that on the language of the contract, there was a fair issue to be tried as to whether the affiliates were in breach of their agreement with CBC but the test applied was whether CBC had made out a "prima facie case" (not a fair issue to be tried) and CBC had not satisfied this higher burden.*

***Issue on Appeal:*** Whether the chambers judge erred in applying the test for an injunction.

***Held:*** The chambers judge erred in the first prong of the test (above), but not the second. The appeal was dismissed.

- The BCCA held that the first prong of the test should be "a fair question to be tried" rather than a "*prima facie* case". The difference between the two is essentially an evidentiary burden. The strength of the case **is not considered under the first prong**.
- The chambers judge held that on the second prong, CBC had failed because the balance of convenience favoured refusing an injunction. This finding was not varied by the BCCA.

**Factors to assess the balance of convenience**:

- Adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted;
- The likelihood that if damages are finally awarded they will be paid;
- The preservation of contested property; [property rights are very important]
- Other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;
- Which of the parties has acted to alter the balance of their relationship and affect the status quo;
- The strength of the applicant's case;

- Any factors affecting the public interest; and [ex: Wales→ in the public interest to protect fisheries; usually comes up when the Crown is a party]
- Any other factors affecting the balance of justice and convenience.
  The factors are inclusive, not exclusive. [there could be other factors which the Court hasn't mentioned]
- The factors are to be weighed in the circumstances, not merely mechanically applied. It is not a formula or a checklist but an **overall assessment**.
- Which party is altering the *status quo* can be a difficult matter to determine. There are 3 considerations:
  1. which party took a step that first altered the *status quo;*
  2. which party did the thing which is said to be actionable; and
  3. The nature of the conduct said to be wrongful and which is continuing when the injunction application is made.

### *Vieweger v. Rush, (SCC 1964)*

**The rule is when an undertaking is given and the case fails there is a presumed inquiry into damages unless there are special circumstances. This means more than just the order was obtained in good faith.**

*Underlying action by the plaintiff claiming that the supplier of equipment for a construction project was its partner and bound by contract to have equipment remain available for use. The supplier had been unpaid and threatened to withdraw its equipment unless paid. The plaintiff obtained an injunction preventing the supplier from removing the equipment on the basis it would be a breach of the construction contract. The injunction order included an undertaking as to damages if the equipment supplier suffered damages as a result of the order. The SCC eventually held the supplier was not bound by the construction contract. Consequently the injunction had been unwarranted.*

***Issue:*** Whether the undertaking as to damages was engaged in these circumstances.

The plaintiff argued:

1. Damages were only payable pursuant to the undertaking if the plaintiff had acted improperly in obtaining the injunction.
2. Damages should not be payable because there were "special circumstances", namely that it had not obtained the injunction through a misrepresentation, and that both courts below had accepted that the plaintiff was entitled to an injunction.

***Held:*** The court rejected both arguments. The rule is when an undertaking is given and the case fails there is a presumed inquiry into damages unless there are special circumstances. This means more than just the order was obtained in good faith.

An order for damages was appropriate. The plaintiff obtained use of the equipment, which made it unavailable to the supplier to use in its business.

Examples of truly special circumstances include:

- where a public body acts in the public interest to preserve the *status quo*;
- where a defendant has succeeded on the merits, but has engaged in misconduct disqualifying it from seeking damages ["hasn't acted with clean hands"].

## Mareva Injunctions

A *Mareva* injunction is an order intended to prevent the removal of assets from the jurisdiction or reach of the court.
[this is before a matter comes to trial; the concern is that there is no funds left at the end]
Can be a very draconian order in effect [Canada is more strict than England; **very exceptional remedy**]
The **impact of the order on another party's ability to conduct business**, or on the subject party's ability to defend itself in the litigation are common considerations, a Mareva injunction is very consequential!
Per ***Aetna Financial Services Ltd:*** The **test** for a *Mareva* Injunction is: **The applicant must show a "strong *prima facie* case", not just "a good arguable case"** and the applicant must persuade the court through evidence that the respondent is: **removing or there is a real risk that the respondent is about to remove assets from the jurisdiction to avoid the possibility of a judgment**, or **that the respondent is dissipating assets in a manner outside of the usual or ordinary course of business.**

**As *Reynolds*** demonstrates, will need some assets in Canada, and the Court warns against **litigious blackmail;** The Mareva injunction can't be entirely territorial in effect!

The Court will turn its mind to the effect of a Mareva injunction on third parties. In ***Silver Standard*** even though the plaintiff would be unable to execute in the absence of a Mareva, the Court didn't interfere with the TJ decision to set it aside. Had been originally done because of the effect the order would have had on an innocent third party [trying to stop them from paying someone else essentially]

### *Aetna Financial v. Feigelman, (SCC 1985)*

**Course of business, not trying to avoid judgment, plus they were doing it within Canada**
*Appeal to the SCC from the granting of a Mareva injunction. Pre-Vue had defaulted on debentures held by Aetna. Aetna had a receiver appointed over Pre-Vue. Pre-Vue and its shareholders claimed against Aetna for failing to give it time to cure its default. Pre-Vue sought an injunction enjoining Aetna from removing assets from Manitoba, including the funds recovered in the Pre-Vue receivership and $270,000 Aetna held from a receivership of another company. Aetna had been about to transfer the $270,000 to one of its business offices in Ontario or Quebec in* ***the ordinary course of its business****.*

- The court notes that the general principle in Canadian law is that a litigant should not be permitted to seize assets of a defendant in advance of judgment.
- While the extraordinary relief of a *Mareva* Injunction is available in Canada, a higher threshold than an ordinary injunction must be required.

The **test** for a *Mareva* Injunction is: **The applicant must show a "strong *prima facie* case", not just "a good arguable case"** and the applicant must persuade the court through evidence that the respondent is:

- **removing** or there is a **real risk** that the respondent is about to remove assets from the jurisdiction to avoid the possibility of a judgment, or
- that the respondent is dissipating assets in a manner outside of the usual or ordinary course of business.

***Held:*** The *Mareva* injunction originally ordered was set aside. The court notes that removal of assets from the jurisdiction of one province to another should cause less concern given the rights a creditor has **within the Canadian federal system**. The funds were to be transferred within Canada and **in the ordinary course of business**, not to avoid judgment

### *Reynolds v. Harmanis, (BCSC 1995)*

Need some assets in Canada to effect a Mareva injunction, otherwise will have too big of a third party effect
*The plaintiff, a resident of BC, claimed against the defendant for breach of a partnership agreement.*
*The defendant had previously lived in BC, but now resided in Australia. His wife and son continued to live in BC, but otherwise he had no discernible connection to BC. Plaintiff adduced evidence that the defendant was trying to hide his assets; had things "in name only". The plaintiff could not produce the agreement or establish the terms of the agreement other than through his recollection; was relying on his own recollections.*

***Held:*** The court finds that the plaintiff did not have a strong *prima facie* case, and on that basis alone the application was dismissed.

- A *Mareva* Injunction could not be granted where the order would be entirely extraterritorial in effect.
    - either the assets sought to be restrained must be in the jurisdiction, or
    - the respondent to the application must be in the jurisdiction
    - … at least one or the other must be in the jurisdiction.
- If the respondent is not in the jurisdiction, he is not able to quickly seek to set aside the order.
- An order restraining use of all assets worldwide may have too significant an effect on the respondent or third parties.
- The court cites *Aetna* – a judge must be mindful not to allow "**litigious blackmail**" through issuance of a *Mareva* Injunction.
- There was no real evidence of imminent dissipation of assets, rather, the applicant was really seeking to have the defendant post security.

### *Silver Standard Resources v. Joint Stock Co. Geolog, (BCCA 1998)*

**Even though the plaintiff would be unable to execute in the absence of a Mareva, the Court didn't interfere with the TJ decision to set it aside. Had been originally done because of the effect the order would have had on an innocent third party [trying to stop them from paying someone else essentially]**

*The plaintiff loaned money to the defendant Geolog, including advancing money on its behalf to Cominco. Upon commencing an action to recover the debt the plaintiff sought a Mareva Injunction barring the other defendant Cominco from paying funds to Geolog. Geolog applied to have the order set aside and was successful before the chambers judge, based in part on the effect the order may have had on an "innocent third party". The chambers judge also considered that the payments were being made in the ordinary course of business, rather than to avoid paying a judgment. The Plaintiff appealed.*

***Held:*** There was no basis to interfere with the order setting aside the *Mareva.*

Although: the plaintiff had a very strong case; it would be unable to execute on a judgment in the absence of a *Mareva* Injunction; and a more "relaxed approach" to the *Mareva* criteria, which took into account all of the circumstances, was appropriate;

The BCCA could not conclude that the chambers judge had erred in refusing to enjoin the transactions made in the ordinary course of business. The factors the chambers judge considered were the appropriate ones.

- **The ultimate test was whether it was fair and just in the circumstances to interfere with the defendant's assets for the course of the proceedings**.

### Anton Pillar Orders

The purpose is to preserve evidence pending trial. These orders can effectively authorize a party to enter the premises of another party and seize property in advance of trial without prior notice.

- Obtaining such an order requires **a high threshold** to be satisfied and safeguards to be implemented.
- These types of orders are often sought in cases dealing with intellectual property rights.
- Expensive, can have consequence on the business of a party for a few days [disruptive; someone is coming into your business for a few days]

The **test** for an *Anton Pillar* order is:

1. **An extremely strong *prima facie* case**
2. **Very serious potential damage to the plaintiff**
3. **Clear evidence that the defendants:** have incriminating documents or other evidence in their possession; and a real possibility those documents or other evidence may be destroyed if the party has notice of an application.

In ***Pillar*** the Court was convinced that the party at issue was going to try to get rid of the evidence of their illegal activity.

In addition to this stricter test, the court held that the order should be enforced with additional safeguards in place such as:

- The party which has obtained the order is expected to act with circumspection.
- The subject of the order should be given the opportunity to consult with counsel in respect of the order before providing access to the premises.
- The service of the order and its execution should be supervised by an **independent** solicitor who acts as an officer of the court (but is paid by the party who has obtained the order).
- **In Canadian cases, our courts have emphasized the importance of a limited order which identifies to the greatest extent possible the material to be preserved**, i.e not given a "hall pass" to go look at all the documents of another company, really just want to get ahold of the ones that are relevant to the dispute].

Our courts have also emphasized the role of the independent supervising solicitor, particularly in ensuring that privileged material is preserved but not disclosed.

### *Anton Pillar K.G. v. Manufacturing Processes, (C.A. 1975)*

The plaintiff, a German manufacturer of electric motors and generators, provided the defendant with confidential information about its products to allow the defendant to act as its agent and sell its products in England.

- Through former employees of the defendant, the plaintiff discovered that the defendant was offering its confidential information to a rival German manufacturer.
- The plaintiff wished to apply for an injunction enjoining the defendant from disclosing confidential information, however, it was concerned the defendant would destroy the evidence of its breaches if it were given notice of the application [so wanted to do this without giving notice of what was happening].
- At first instance the court recognized the risk of the destruction of evidence, but an order to seize documents was not permitted as it might become an instrument of oppression and abuse.
- On appeal, the ECA held that there was not ability for the court to authorize a "search warrant". The plaintiff may only enter the defendant's premises with permission. However, through the *Anton Pillar* order, the court effectively orders the defendant to give the plaintiff that permission, or otherwise be subject to a finding of contempt if the order is not subsequently set aside.
- Includes test above; foundational case for this type of order

## Pre-judgment Garnishing Orders

**A plaintiff typically has no recourse against a defendant until there is a judgment, and garnishing essentially enables the plaintiff to take from the other side's assets *before* a judgment**

- Like pre-trial injunctions, pre-judgment garnishing orders are another exception to that rule. Post-judgment garnishing orders are also available.
- Pre-judgment garnishing orders are provided for in the ***Court Order Enforcement Act*.**
- **Section 3(2)** permits a judge **or** registrar to order that all debts owing from the garnishee (a third party) to the defendant be "attached" up to the amount of the debt or claim.
- The order can be made on application without notice to any person.
- The claim must be for a liquidated amount.
- The application must be supported by an affidavit that sets out the information in (d), (e) and (f):
    - An action has been commenced, and when it was commenced.
    - Nature of the cause of action;
    - Amount of the debt, claim or demand;
    - The amount is justly due and owing after making all discounts;
    - The garnishee is indebted to the defendant;
    - The place of residence of the garnishee.
- Once the order is granted, it is operative once it is served on the garnishee – **s. 9(1).**
- Cannot garnish wages pre-judgment – **s. 3(4)**; have to leave the person with enough money to survive and subsist
- A garnishee can either dispute the debt allegedly owing to the defendant, or pay the garnished amount into court
- If the garnishee does neither, the court can order the garnishee to do so, and pay costs of the process – s. 11(a).
- The defendant must be served with the garnishing order – s. 9(2).
- Any technical defect in the application for pre-judgment garnishment will result in the order being set aside.
- The affidavit in support must be **complete and accurate**.

***Court Order Enforcement Act*, ss. 1- 27; Schedule 1, Forms A – F,**

***Knowles v. Peter (BCSC 1954)***

**Need to describe the cause of action; otherwise the Court is not going to make this type of order!**

***The*** plaintiff obtained a garnishing order based on an affidavit which described the nature of the cause of action as "debt on a chattel mortgage". [this isn't actually a case of action; just describing a mortgage]

***Held:*** The garnishing order was struck. Attachment of debts before judgment is an extraordinary process. Meticulous observance of the requirements of the statute is required. The statute required a description of the nature of the cause of action which the court held to mean a "succinct and informative statement".

The affidavit did not describe a cause of action, but rather a form of security.

## Expert Reports

**Experts and Expert Evidence**

The procedures relevant to the use of expert reports are governed by **Rule 11.** These rules concern procedural matters as opposed to matters of substance (procedural admissibility vs. substantial admissibility).

- **So be concerned with both: rules of evidence + procedural requirements**
- If you intend to adduce expert evidence, follow these rules:
    - Application of the rule: **Rule 11-1**
    - Duty of the expert: **Rule 11-2**
    - Appointment of the Expert: **Rules 11-3, 11-4** and **11-5**
    - Content of reports: **Rule 11-6**
    - Use of expert evidence at trial: **Rule 11-7**

While you want to have impartial experts; but there is strategy going into which expert you have [there is privilege over communication with experts but it has its limits]

**Admissibility & Substance**

- Generally, evidence is only admissible at trial to establish facts - expert evidence is an exception to this rule.
- Properly qualified experts are entitled to give evidence of their opinions where such opinions are admissible.
- The admissibility of an expert opinion is governed by the common law.

***R. v. Mohan*** provides that admissibility depends on: i)Relevance; ii) Necessity in assisting the trier of fact; iii)A properly qualified expert; iv)The absence of any evidentiary exclusionary rule

***Yewdale*** sets out the general principles regarding admissibility of expert reports: Opinion evidence is only admissible if it is of assistance in matters outside of the ordinary experience of the trier of fact.

- Expert opinion must be limited to the stated area of expertise [if you state an area of expertise then the opinion given must fall wi that].
- The expert must not make conclusions of fact on issues in dispute [**not fact finding]**.
- Experts must be independent not advocates [must be impartial]
- Experts must not express opinions on the law.
- Also shouldn't make self-evident statements, won't be useful to the Court

**Application**: **Rule 11-1** Excludes the application of Rule 11 for summary trials.

**Duty of Experts: Rule 11-2**: All experts have a duty to assist the court and not be an advocate for a party. Experts must expressly certify their awareness of the duty and that the report conforms to the duty
Per ***Vancouver Community College,*** advice must remain independent and objective. In that case, counsel made innapropriate suggestions regarding the content of the report.

**Requirements of Expert Reports: Rule 11-6**
The content of the report is dictated by: **Rule 11-6(1)**

**Service of Expert Reports:**

- A Report must be served at least **84 days** before trial: **Rule 11-6(3)**
- Responsive reports must be served **42 days** before trial: **Rule 11-6(4)**

- Material changes to opinion of expert must be made by Supplementary Report served on other parties and must set out changed opinion and reason for it: **Rule 11-6(5)-(7)**
- Objections to admissibility must be made on the earlier of the trial management conference or 21 days before trial**: Rule 11-6(10)-(11).**

**Per** *Turpin***:** Must sufficiently set out qualifications to give opinion evidence and those qualifications must be related to opinion; also the expert sought to answer the ultimate issue; also straying into advocacy through use of bolding

| Appointment of Experts | |
|---|---|
| **Joint Experts: Rule 11-3** | Two or more parties can appoint a joint expert if they agree on the following:<br>• Identity of expert<br>• The issue in the action needing an opinion<br>• Facts or assumptions for expert (joint [this would probably be done at case planning conference]or individual)<br>• Questions to be considered by the expert<br>• When report is to be prepared<br>• Who pays the fees and expenses<br>The court may order the appointment of a joint expert subject to the above matters being settled (either at a case planning conference or by application of one of the parties): **Rule 11-3(3)-(5)**<br>An agreement must be entered into and disclosed to all parties: **Rule 11-3(6)**<br>In the event a joint expert is appointed, the joint expert :<br>• is the only expert who may give expert opinion on the issue, except where leave is granted to file additional expert evidence: **Rule 11-3(7) and (9)**<br>• is subject to cross by all parties: **Rule 11-3(10)**<br>• A joint expert is not the same as a common expert: see **Rule 11-3(11)** - parties with shared interests can appoint a common expert as opposed to a joint expert.<br>*this isn't commonly used |
| **Appointment of Own Expert: Rule 11-4** | • Subject to a Case Plan, each party can appoint its own expert. |
| **Court Appointed Expert Rule 11-5:** | • The court may appoint an expert on its own initiative.<br>• The court can request parties to suggest names, state connection with expert or provide other material.<br>• Each party can cross-examine the court appointed expert.<br>• The court can order a party to pay the expert fees.<br>• Any report prepared must be tendered into evidence. |

**Requirements of Expert Reports: Rule 11-6**

Production of the material relied on by the expert (expert's file) is governed by **Rule 11-6(8):**

(a) FIRST: Expert must disclose upon request of any party of record:
- Written statement of facts
- Independent observations
- Data
- Results of tests

(b) SECOND: Expert must disclose upon request of any party of record, the contents of the expert's file relating to the preparation of the opinion:
- Promptly after receipt of the request if made less than 14 days before trial, or
- At least 14 days before trial

Per ***Delgamuukw***: sought clear copies of expert files, some of it was blacked out for privilege. Clear copies were ordered. Experts must disclose all documents that have been in the expert's possession, including draft reports and other communications relevant to matters of substance or credibility. Solicitors brief priviledge shold be persevered, but not to the extent of compromising the integrity of the trial process.

- Materials that must be disclosed include:
  - Letters of instruction [rely on x,y,z facts or assumptions; answer the following questions].
  - Fee agreements [how much you are paying them].
  - Written communications from the party or its agents or lawyers relating to the assignment.

- Memoranda and drafts.
- Suggestions from others.
- Any other written material which has or might have been considered by the witness in preparing the report. Ex: papers by others in their field
- A claim for privilege must be made by providing a reasonable description of the document.

- An expert may be asked about oral communications that go to the substance of the evidence or credibility.

**Expert Opinion Evidence at Trial: Rule 11-7**

**Expert opinion at trial is limited to evidence contained in an expert report, served in accordance with the rules, including delivery of Supplementary Reports, if any: Rule 11-7(1)**

- This functions to not surprise the other side with the evidence that you will be bringing
- If no one requires attendance for cross, the report becomes evidence at trial subject to the Court ordering otherwise, subject always to admissibility: **Rule 11-7(2) Can object to the contents of the report!**
- A party may require the expert's attendance for cross-examination: **Rule 11-7(3)** (*request should be made wi 21 days of service*: **Rule 11-7(2))**
- Expert can testify if a request was made to cross-examine, or if the expert's report was properly served and the evidence of the expert is necessary to clarify terminology or make the report understandable to the court (in order words, you can only call your own expert in direct for this limited purpose): **Rule 11-7(5)**
- **Evidence of a technical accepted standard within a given profession is useful for the Court , but can't give opinion on LEGAL duty [*Surrey Credit Union*]**

**Exception to Part 11: Rule 11-7**

The court may dispense with requirements of Part 11 if:

- New facts come to the knowledge of one or more of the parties that could not have been learned through due diligence
- There is no prejudice
- The interests of justice require it

*Turpin v. Manufacturers Life Insurance Company, 2011 BCSC 1159*

**Must sufficiently set out qualifications to give opinion evidence and those qualifications must be related to opinion; also the expert sought to answer the ultimate issue; also straying into advocacy through use of bolding**

*Underlying claim by the plaintiff for denied coverage under her travel insurance policy. The defendant sought to adduce the report of an "internal medicine expert" at trial on the issue of whether the plaintiff had obtained medical treatment as "the result of a pre-existing condition as defined in the Travel Insurance policy".*

- The Plaintiff objected on the grounds that:
  - The report did not set out the expert's area of expertise, her qualifications, employment and educational experience in that area of expertise.
  - The opinion sought to answer the ultimate issue for the court.
  - The documents relied on by the expert in forming the opinion were not listed.

***Held:*** The court finds that the expert's report does not sufficiently set out qualifications to give opinion evidence. While the statement of qualifications identified the witness as practicing "internal medicine", that alone is not sufficient. The court finds that the qualifications must be related specifically to the opinion to be given. The opinion sought was whether medical treatment was the result of a "pre-existing condition as defined in an insurance policy".

- The qualifications of the witness suggest no expertise in definitions found in insurance policies.
- The court also finds that the **opinion sought would offend the "ultimate issue"** rule in that the expert would answer the very question the court is meant to decide.
- As for documents, the expert referred in the report to a review of clinical manifestations and a review of "literature" without listing the particular documents reviewed as required by **R. 11-6(1)(f)(iii)**. Expert has to list material facts they are relying upon; their qualifications; need to give your expert **Rule 11-6** so they make sure they have everything in it. **Educate your expert!**

- Finally, the court held that it was not appropriate for an independent expert to use bold and italicized fonts to emphasize portions of the report, which benefit the party, which retained the expert. The use of such emphasis strays into advocacy.

### *Vancouver Community College v. Phillips Barratt, (BCSC 1988)*

**Advice must remain objective and independent, counsel can't make innapropriate suggestions regarding content**

*A claim was brought against architects and engineers for professional negligence. The plaintiff's case relied on one expert in particular, whose report was revised on 10 occasions with "considerable advice" from counsel. Counsel had made comments along the line, ex: this hurts us, take it out. He started advising other experts on what to put into their reports. The report was objected to*.

***Held:*** The report was rejected and the plaintiff's claim dismissed. [It was the main source of evidence for the plaintiff]

- Experts may revise their reports, and counsel may consult with experts during the drafting of reports, however, the expert must remain independent and objective. Cannot revise the substance of the opinion!
- Counsel made suggestions with respect to the substance of the expert's opinions which is not appropriate.
- The report was "substantially rewritten by counsel".
- The expert and report were partisan, one-sided and of no value.
- The evidence would have been rejected even if not contradicted by other evidence.

### *Delgamuukw v. B.C., (BCSC 1988)*

*Land claims case in which the plaintiffs sought to demonstrate through expert evidence that events occurred that corroborated the oral histories of the plaintiffs. The experts' files were disclosed. Some documents contained in the files of the experts were blacked out for privilege. The defendants sought disclosure of clear copies of all of the documents in the files.*

***Held:*** The clear copies were ordered to be produced.

***Delgamuukw v. BC***

- The court cites ***Vancouver Community College*** and holds that an expert called to testify must produce all documents which are or have been in the expert's possession, including draft reports and other communications, relevant to matters of substance or credibility.
- Solicitor's brief privilege should be preserved to the greatest extent possible, but not at the expense of the integrity of the trial process. **The exception in this instance relates to the integrity of the trial process**
- Solicitor's brief privilege is waived in respect of matters of substance once the expert is called to give evidence:
    - Documents or communications that relate to the substance of the evidence or credibility must be disclosed.
    - Comments of counsel that do not relate to the substance or credibility of the evidence may remain privileged.

Materials that must be disclosed include:

- Letters of instruction [rely on x,y,z facts or assumptions; answer the following questions].
- Fee agreements [how much you are paying them].
- Written communications from the party or its agents or lawyers relating to the assignment.
- Memoranda and drafts.
- Suggestions from others.
- Any other written material which has or might have been considered by the witness in preparing the report. Ex: papers by others in their field
- A claim for privilege must be made by providing a reasonable description of the document.

- An expert may be asked about oral communications that go to the substance of the evidence or credibility.

***Surrey Credit Union v. Wilson et al, (BCSC 1990)***

**Evidence of a technical accepted standard within a given profession is useful for the Court , but can't give opinion on LEGAL duty**

*An application for a ruling on the admissibility of an expert report at trial. Action involved a claim in relation to a negligent audit – alleged it failed to adhere to generally accepted auditing standards within the accounting profession. The expert witness was called to give evidence on behalf of the plaintiff as to the appropriate standards of practice by chartered accountants when conducting an audit.*

- The defendants objected to the report of the expert witness on the basis that it contained :
    - Opinion evidence outside the expertise or qualifications of the expert;
    - Argument rather than opinion; and
    - Large irrelevant passages.

***HELD:*** The report was not satisfactory in its present form (too long and contained too many objectionable opinions; IT WAS 200 PAGES). However, it could be rewritten to adhere to the principles enunciated by the court. Evidence of an accepted standard within a profession is technical information that would be of assistance to the court.

- An expert **CAN** give evidence as to:
    - whether the standard was adhered to or breached based upon hypothetical or assumed facts (the source of assumed or hypothetical facts must be provided).
- The expert **cannot**:
    - give an opinion on the legal duty, or make conclusions of fact or law (i.e. make factual conclusions based on a review of the evidence or conclude the defendants were negligent);
    - give argument disguised as opinion.

Those conclusions are for the court.

The plaintiff was entitled to:

- lead expert evidence of the generally accepted auditing standards acknowledged by the accounting profession;
- elicit an opinion as to whether or not the acts or omissions occurring in an audit would be regarded within the accounting profession as breaches of those standards.

The expert was not entitled to give an opinion on:

- the legal duty imposed by the standards;
- whether the breach of the standard was actionable at law.

***Yewdale v. Insurance Corp. of B.C., (BCSC 1995)***

**Sets out general principles regarding the admissibility of expert reports: can't make conclusions on facts, opinions on law and not make self evident statements**

*Case dealt with the admissibility of expert reports in the context of an MVA*

***At Issue:*** FIRST, Whether the first report, dealing with the standard of care required of solicitors in personal injury claims, **was based in part upon inferences of fact drawn by the author and contained conclusions of law articulated in the** same manner and on the same points as the court would be required to do

NOTE: [it is not the role of an expert to draw inference of fact/law; **this is the role of the Court, not the role of an expert]**.

SECOND, Whether the second report, which was on the same issue, also contained legal conclusions as to whether the lawyers discharged their duties in accordance with the standard of the "reasonably competent solicitor".

THIRD, Whether the third report, dealing with the insurer's conduct in the investigation and negotiation, was a combination **of self-evident statements**, permissible statements of industry standards and legal conclusions based on inferences drawn from the facts.

FOURTH, Whether the fourth and fifth reports which dealt with the appropriateness of the awards made against the plaintiff with respect to medical care costs, fund management, tax gross-up and income loss were admissible.

***Held:*** The reports were mostly rejected because they made conclusions that are for the court, or are "self-evident" and of no assistance.

The court summarizes the principles applicable to expert reports:

- Opinion evidence is only admissible if it is of assistance in matters outside of the ordinary experience of the trier of fact.
- Expert opinion must be limited to the stated area of expertise
- The expert must not make conclusions of fact on issues in dispute
- Experts must be independent not advocates
- Experts must not express opinions on the law .

The fifth report alone was admissible, **subject to further argument on its relevance** [returning to Mohan criteria!] being raised at the trial. It could not be properly excluded in that it was not clear whether it would be totally irrelevant.

- The first and second reports were inadmissible in their entirety in that the authors, contrary to the applicable principles, made findings of fact on disputed issues and attempted to perform the function of the court and of counsel by articulating what were essentially legal conclusions and opinions based on their understanding of the facts.
- The third report was inadmissible on precisely the same grounds.
- The fourth was inadmissible because it was of no assistance to the court in that it only contained self-evident statements on the issues requiring resolution at the trial.

# Trial Procedures and Costs

## Trial management, Rule 7-4, Rule 12-2

Much of the actual conduct of trial is governed by the rules of evidence and advocacy. Trial procedure itself is governed by **Rule 12** **[**read it carefully before your first trial!]**:**

| | |
|---|---|
| **12-1** | Setting the trial<br>• Trial dates are set by reserving a trial date with the Registry and then filing and delivering a Notice of Trial – **12-1(2)**<br>  • Generally as a matter of practice and courtesy you consult with the other side before reserving trial dates. [note now the calendar is so full trials are being set for 2015] |
| **12-2** | Trial Management Conferences (TMCs) *Essentially, are parties ready for trial?*<br>• A TMC is mandatory at least 28 days prior to the scheduled trial date – **12-2(2)**<br>• Forum to obtain orders respecting trial – **12-2(9),** ex: wrt depositions |
| **12-3 & 12-4** | Trial Record and Trial Certificate: *these docs indicate you are ready to go!*<br>• Each party must file a **trial brief** in advance of the TMC in **form 41** and serve on all parties – **12-2(3)**<br>• The party that filed the notice of trial must also file **a Trial Record (12-3)** [cover page and all of the pleadings that have been filed, notice of claim, reponses etc.] and a **Trial Certificate** (12-4) [indicates the readiness of the parties] at least 14 days, but no more than 28 days, prior to the trial date. |
| **12-5** | Evidence and Procedure (the trial roadmap)<br>• **Rule 12-5** deals with evidence and procedure at trial, and covers important issues such as:<br>  • Calling adverse witnesses;<br>  • Subpoenas; served on someone for them to appear in Court<br>  • Use of evidence from discoveries, depositions, affidavits and interrogatories. |
| **12-6** | **Jury Trial** |

## Expedited Trials, Rule 15-1

**FAST TRACK: Rule 15 [**It is a faster way to get to trial, but should make a judgment call if you are going to use it]

**Availability: 15-1(1)**

- Amount in issue is less than $100,000; [*but as the facts develop, if your claim is worth more then it doesn't bind the judge to only award that much, just your initial estimate]*
- trial can be completed within 3 days;
- the parties consent; or
- the court orders it.
- NOT AVAILABLE for jury trials or class proceedings – **15-1(4)**
- **How engaged: 15-1(2)** can be requested by any party of record by way of **notice of fast track** in Form 61; the words "Subject to **Rule 15-1**" must be added to the style of proceedings for all subsequent documents filed in the

**Features of Fast Track litigation:**

- Nothing in the rules limits the court from awarding damages in excess of $100,000 – **15-1(3)**
- **No contested hearings without first attending a CPC [**this sets a schedule for the trial] or **TMC [**these usually happen later] (subject to some limited exceptions: ex: to bring summary proceedings or add or remove parties etc.) – **15-1(7) & (8)**
- XFD of a party by all other adverse parties is limited to a total of **2 hours** unless the parties consent or the court makes an order – **15-1(11)**
  - must take place 14 days before trial – **15-1 (12)**
- Document discovery is the same as any other action
- Trial date within 4 months of the application for a trial date (provided the application is timely) **– 15-1(13)**
- No Jury – **15-1(10)**
- No specific provision regarding the use of experts – this is governed by Part 11, as with all other actions
- **Costs are fixed** (unless the court otherwise orders or the parties consent, subject to settlement offers) – **15-1(15)** & (16);

# Costs

## Party and party and special costs

**Purpose of cost orders: Indemnify successful litigants in whole or in part for the costs incurred in establishing their legal rights;**

- **Deter frivolous proceedings and defences**;
- **Deter unnecessary steps in litigation**;
- **Encourage meaningful settlement offers and negotiation between the parties**.
- Costs are payable either under the Rules of Court (Rule 14 and Appendix B) or as a result of a specific order of the Court.

**THE PROCESS:** Bill of Costs, Form 62→ can't agree – ask for an assessment before the Registrar→ Certificate of Costs

**TYPES OF COST ORDERS**

***Party and party costs:*** the default at the conclusion of an action, based on creating a bill of costs from set form of allowable costs.

***Costs in the cause:*** whoever wins the ultimate issue is awarded costs of the application or step at issue.

***Costs in any event of the cause:*** the party is awarded costs of this application or step irrespective of who wins the ultimate issue.

***Costs payable on a lump sum basis:*** orders for a specific sum to be paid to the successful party .

***Costs payable forthwith:*** Generally, costs are paid at the end of the action, unless an order is made that the costs be payable forthwith. Generally, a deadline by which costs are to be paid is included in such an order.

***Special costs:*** A form of increased costs, which unlike "party and party" costs are often based on the legal fees actually incurred by a party, rather than on the Appendix of costs allowed.

- *They are usually a double cost, somewhere in btw 1.5, or they can be the actual legal fees incurred, and you regain your full fees. If it is the type of conduct that the Court wants to deter*
- ***Lee v Jarvie*** discusses special costs

**PARTY AND PARTY COSTS**

**The Default - Party and Party Costs**

Costs are payable on a "party and party" basis under **Appendix B** unless the circumstances of the case bring it within the EXCEPTIONS, which are:

- agreement of the parties
- special costs
- lump sum costs
- fast track

Units assigned a value: **Scale A** - for matters of little or less than ordinary difficulty; **Scale B** - for matters of ordinary difficulty; **Scale C** - for matters of more than ordinary difficulty

CALCULATED BASED ON APPENDIX B [Annual Practice p1125]

When assessing costs the Registrar will allow those fees and disbursements that were **proper** or **reasonably necessary** to conduct the proceeding:

- Something is deemed **necessary** if it is indispensable to the conduct of the proceeding.
- Something is deemed **proper** if it was not necessary but was reasonably done or incurred for the purpose of the proceeding.
- A Registrar will disallow fees and disbursements that appear to have been incurred or increase through extravagance, negligence, or mistake or by payment of unjustified charges or expenses.
- **EXAMPLE:** Even if the Court doesn't put a lot of weight on your report in the end, you would argue at the time you made the decision to retain the expert, it was both reasonable and necessary.

**COSTS: Rule 14-1(15)**

- More on the discretion to award costs (apportionment of costs) – 14-1(15); Costs are usually awarded to the successful party with some exceptions.
- What happens if success is divided?

**Disallowance of fees and costs: Rule 14-1(33)**

Where the lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any of the following:

- disallow fees between a solicitor and the solicitor's client;
- order the solicitor to indemnify his or her client for costs ordered paid to other party;
- order that the solicitor be responsible for costs payable in the proceeding; and
- make any other order it wishes to.

- BE CAREFUL. It was once thought that this rule applied only in cases of egregious misconduct but a recent CA decision has decided otherwise. The clear language of the rule governs.

***Giles v. Westminster Savings and Credit Union, 2010 BCCA 282***

The plaintiffs brought claims arising out of investments made in a real estate development company that became bankrupt. A number of actions on the same basis had proceeded to trial and been dismissed.

- In the court below, the claims were dismissed.
- The plaintiffs were ordered to pay part of the defendants costs.
- The plaintiffs claimed they should not have to pay costs given:
  - the nature of their case – as a test case [*sometimes gov't will assume costs for a test case]*
  - their inability as individuals to bear the financial burden of costs
  - that this would raise issues as to access to justice

***Held:*** The court finds that the plaintiffs did not overcome the onus on them to show that cost were not appropriate. The circumstances were not such that a costs order may prevent "access to justice", nor was the matter a "test case". An order of costs against the plaintiffs was appropriate. The costs orders are upheld and in addition the plaintiffs are held jointly and severally liable for costs.

***Of Note:***

- The court considers the allocation of costs that the trial judge found was appropriate at 90 and 85% instead of full costs. The court felt they didn't have the benefit of all the information.
- The court holds that costs orders are **discretionary** and the apportionment should not be subject to "**microscopic analysis**" and refuses to review the orders. More of a "global" assessment

***Rana v. Nagra, 2013 BCSC 184***

Court granted an award of special costs where plaintiffs inappropriately used a CPL

***Lee v. Jarvie, 2013 BCCA 17***

Personal injury matter in which the Plaintiff was only successful in proving some of heads of damages pleaded. [she argued she had a big income loss but that wasn't found to be proven]

The BCCA examined whether the change in the language of the new **Rule 14-1(15)** from "issue" to "matter" changes the analysis. **QUESTION IS UNRESOLVED**

Appeal was granted

**Special costs are an exception to the general rule**. They are available either for the whole of the proceeding or a step or particular steps in the proceeding.

**Purpose:** Special costs address conduct – they are punitive in nature and encompass an element of **deterrence**. They protect the integrity of the litigation process and to guard against abuse.

**When available:** In order for special costs to be awarded, the conduct of the party in question must be reprehensible. This encompasses scandalous or outrageous conduct and also milder forms of misconduct deserving of reproof or rebuke. They are ordered to chastise or punish a litigant who has engaged in reprehensible conduct – ***Rana v. Nagra***

**Examples:** Types of conduct that may attract an award of special costs include:

- witness tampering
- material non-disclosure or misdisclosure on an *ex parte* application
- the commencement of proceedings without merit and for improper motives
- contempt of court [not abiding by a Court order]
- pursuit of unfounded allegations made recklessly or out of malice
- conduct intended to mislead the court through contrived or fabricated evidence or otherwise abusing the litigation process

Pre-litigation conduct which warrants special costs is (or should be) limited to cases of fraud or unconscionability.

## Offers to settle

**Rule 9-1:** governs offers to settle and costs consequences that flow from such offers.

**Form of offer:** No required form but offer must:

- Be in writing
- Delivered to all parties of record;
- Contain the wording in **Rule 9-1** indicating that the party making the offer is reserving the right to bring the offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues.

**OFFER NOT TO BE DISCLOSED:** fact of an offer not to be disclosed until all issues, except costs have been determined.

**Offers can have a CONSEQUENCE ON COSTS!**

- The Court may (not must) consider an offer in relation to costs
- Various costs options:
  - **Deprive a party of costs to which the party may otherwise be entitled from the date of the offer***; you might want to make it earlier because you will have more bang for your buck; if you don't beat the offer at trial that you received at an earlier date then you might not get your costs*
  - **Award double costs**;
  - **If the plaintiff doesn't beat the offer at trial, award costs to the defendant after the date of the offer.**
  - **EX: *Ward v Klause*: the ultimately successful plaintiff was awarded costs from the date of the first offer, which considerd to be substantial and ultimately not beat at trial**

**Considerations relevant to determining costs consequences of an offer to settle – 9-1(6):**

Whether the offer should reasonably have been accepted?

- A **strategic, nominal** offer may be an offer that ought reasonably to be accepted
- Whether something ought reasonably to have been accepted may require the court to examine what the party knew about his case;
- If there has been a refusal to produce documents or a refusal to attend discovery, may be reasonable to reject offer, I.E *when you don't have all the info!*
- Did the offer give enough time for consideration? *Did the offer expire the next day?*

- The relationship between the terms of **settlement offered** and the **final judgment** of the court.
- The relative financial circumstances of the parties. *Ex: big bank v little plaintiff*
- Any other factor the court considers appropriate.

## Rule 9-1

### *Ward v. Klaus, 2012 BCSC 99*

**Demonstrates the effect of an offer on cost award, here the ultimately successful plaintiff was awarded costs from the date of the first offer, which considerd to be substantial and ultimately not beat at trial**

The plaintiff was awarded $433,103.63 at trial. More than a month before the trial, the defendant made an offer to settle for $493,234.04. Three days before trial the defendant offered to settle for $595,000.

- The plaintiff had assessed her damages at $975,000 and had made an offer to settle for $750,000.
- The defendant sought an order that the plaintiff be deprived of costs and the defendant entitled to costs from the date of one of the two offers.

***Held:***

- The court awarded the plaintiff costs to the date of the first offer, and then each party to bear its own costs after.
- The basis being that there must be some impact for the substantial offers made, which the plaintiff did not beat.
- Forcing the plaintiff to pay the defendant's costs was too great a penalty given that it was not unreasonable for her to have rejected the offers [+ she ultimately won!].
- The court notes that in considering whether the offer "should have been accepted" the review is undertaken without regard to the ultimate outcome.
    - While the difference between the offer and ultimate award was a matter to consider, it was not determinative.
    - The plaintiff's assessment of her claim was $975,000. It could not be said that the plaintiff should have accepted either of the offers for significantly less.
    - On the other hand, both offers were more than was awarded at trial and the plaintiff would have been better off accepting either.
    - The plaintiff would not have been completely impoverished if required to pay costs, but it would have significantly reduce the value of her judgment.
- There was no financial information about the defendant, but he was likely indemnified by his insurer.

## Security for costs

Costs are generally payable at the conclusion of a proceeding, unless otherwise ordered – **14-1(13)**

**In limited circumstances, the court will order a party bringing a claim, particularly a corporate party, to post funds into court to ensure any future costs order is paid.**

An order for security for costs typically includes a stay of proceeding until **security is posted in the required amount.**
**WHY:** The purpose of an order for security for costs is to prevent litigants from arranging their affairs to bring claims without the risk of an effective costs order.

- Parties are permitted to defend a claim without posting security. Reduces the risk for parties to bring claims without really considering the cost consequences for the defendant; placing some of the burden on the party bringing the action prevents abuse of litigation process

**TEST for a security of costs order, per *Integrated Contractors***

1. **The applicant must make out a *prima facie* case that the respondent would be unable to pay costs if the claim fails.**
2. **If the applicant satisfies this requirement, the respondent may defeat the application by showin**g:
   a) It has exigible assets that would satisfy an award of costs; or b) there is no arguable defence to the claim, i.e "I s houldn't have to post security for costs because my claim is good"

**Other Factors:**

The respondent can also resist an order on the basis that:

- An order for security will deprive the respondent of the ability to pursue a valid claim; my money will be in Court and I can't pursue my claim
- Where the respondent is a defendant, that the counterclaim is "sufficiently intertwined" with the defendants defence of the main claim; Its not going to take additional time to deal with the separate issues that I bring as a counter claim
- The financial hardship that makes the respondent unable to pay costs is due to the actions of the applicant.

***Han v Cho*** emphasizes that the **default principle is that** A natural person can sue without giving security for costs in most cases. In the case of individuals, the inherent jurisdiction to order security for costs should be exercised **cautiously**, **sparingly**, and under **very special circumstances**.
The onus is on the applicant to establish that he or she will be unable to recover costs.

A distinction should be drawn between individual plaintiffs and corporate plaintiffs. **The fact that the plaintiff resides outside the jurisdiction, has no assets in the jurisdiction or is impecunious is not sufficient in itself.**

Authority for a security of costs order [**corporations act** + **inherent jurisdiction**]

- The only express authority to make an order for security for costs arises in connection with **corporations**, pursuant to the ***Business Corporations Act*, s. 236:** *"If a corporation is a plaintiff in an action or other legal proceeding and it appears that the corporation will be unable to pay the costs of the defendants if the defendant is successful in the defence,* ***the court may require security to be given by the corporation for those costs, and may stay all proceedings until the security is given****."*
- In addition, the court, relying on its **inherent jurisdiction**, may make an order for security for costs against an **individual**. No rule provides for the authority; would just ask judge pursuant to inherent jurisdiction

***Integrated Contractors Ltd. v. Leduc Developments Ltd., 2009 BCSC 965***
**Sets out test above!**
*The plaintiff, a contractor, performed work on a residential development under a contract with the defendant and claimed it was not paid. The defendant filed a Response and brought a counterclaim for failure to perform the contract and for causing delay in completing the project. The defendant (let's call him the counterclaimant to simplify) also counterclaimed against an engineering firm. The plaintiff and engineering firm sought security for costs in respect of the counterclaim.*
The *prima facie* test was satisfied because:

- the counterclaimant's only asset was the development property which was in foreclosure.
- the counterclaimant had no exigible assets with which to pay costs if the counterclaim failed.
- However, as to whether there was a defence to the counterclaim, the court noted this was a complicated case, and that a full assessment on the merits was not appropriate in an application for security.

The engineering firm had provided only denials of the allegations in the counterclaim without any material facts – this did not satisfy even the low threshold of an arguable defence.

- The counterclaimant did not have the resources to post security for costs, and may be prevented from proceeding with its counterclaim if security were required.
- The counterclaim was inherently intertwined with the counterclaimant's defence of the original claim and most of the costs would be incurred irrespective of the counterclaim.
- In the circumstances, the court considered it unfair to deprive the counterclaimant (as defendant) of its ability to fully respond to the claim brought by the plaintiff by ordering security for costs.

***Held:*** the application for security for costs of the counterclaim was dismissed.

- The court cited the statutory basis for a security for costs order against a BC company, s. 236 of the *Business Corporations Act*.
- In addition to the statute, there is inherent jurisdiction for the court to order security for costs against any litigant advancing a claim (whether a corporation or not).
- The quantum of the order for security for costs is a matter of the court's discretion.

***Han v. Cho, 2008 BCSC 1229***

**Default is that can sue without costs security, should enforce against individual in very special circumstances, as they shoud'nt be deprived of day in court!**

Application by defendants against personal plaintiffs for security for costs in fraud claim. The plaintiffs resided outside the jurisdiction.

***HELD:*** Application dismissed.

- The defendants did not establish that the Plaintiff would be unlikely to pay costs.
- The claim by the plaintiffs was a strong one.
- The justice of the situation did not compel an order for security for costs. There were no special or extraordinary circumstances that would justify such an order.

**Points of Note:**

- **Default principle:** A natural person can sue without giving security for costs in most cases.
- A distinction should be drawn between individual plaintiffs and corporate plaintiffs.
    - In the case of individuals, the inherent jurisdiction to order security for costs should be exercised **cautiously**, **sparingly**, and under **very special circumstances**.
    - The onus is on the applicant to establish that he or she will be unable to recover costs.
- The fact that the plaintiff resides outside the jurisdiction, has no assets in the jurisdiction or is impecunious is not sufficient in itself.
- Examples of egregious circumstances where an order for security for costs against an individual may be allowed:
    - a **weak claim**
    - a **previous failure to pay costs** or refusal to obey a court order.
- **Some considerations include:**
    - Merits of the claim or defence;
    - The ability to order a lesser amount of security;
    - Delay in bringing an application for security;
    - Ability to recover costs.